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Jack Tsen-Ta LEE

*Singapore Management University*, [jack.tt.lee@gmail.com](mailto:jack.tt.lee@gmail.com)

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## Equal Protection and Sexual Orientation

JACK LEE TSEN-TA

*"Let all men be considered equal in the eye of the law."*

– Sir Stamford Raffles, 6 June 1823<sup>1</sup>

Equality is the thread running through the fundamental liberties enshrined in our Constitution. Intoned the Constitutional Commission of 1966: "Every citizen has equal rights and every individual has equal rights... No one citizen ought to have less or more rights than another citizen and similarly no one individual has or ought to have less or more rights than another individual in a democratic nation."<sup>2</sup> Equality, expressed in Art 12 of the Constitution, is also a specific right enforceable by the court. The difficulty comes in applying this deceptively simple concept to real-life situations. As put by Mark Van Doren, equality is "the greatest of all doctrines and the most difficult to understand."

In considering the validity of legislation, Singapore and Malaysian courts have generally favoured rational review, a modest conception of equal protection, unlike their American counterparts

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Jack Lee Tsen-Ta is a fourth year student, Faculty of Law, National University of Singapore, Academic Year 1994-95.

<sup>1</sup> "Raffles' Singapore Regulations – 1823" (1968) 10 Mal LR 248 at 288.

<sup>2</sup> *Report of the Constitutional Commission 1966* at 5 para 22 (Tan, Yeo & Lee, *infra*, n 4 at 796 (Appendix D)).

which have adopted a more expansive reading in the form of strict and intermediate review. This article examines how these three levels of equal protection review operate, and argues that the scheme of Art 12, explicit judicial and academic approval, and policy support a wider interpretation of equal protection. As an illustration, we will look at whether criminal exclusions of male homosexual activity in private under ss 377 and 377A of the Penal Code violate the right to equal protection.<sup>3</sup>

#### I. EQUAL PROTECTION DOCTRINE: STANDARDS OF REVIEW<sup>4</sup>

Breathtaking in its simplicity, Art 12(1) of the Constitution<sup>5</sup> reads: “All persons are equal before the law and entitled to the equal protection of the law.” It is identical to Art 8(1) of the Malaysian Federal Constitution from which it was derived. The Malaysian provision was in turn based on Art 14 of the Constitution of

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<sup>3</sup> Homosexual solicitation and acts occurring in public, which are offences under s 377A of the Code, will not be discussed. Some United States cases have held that where sodomy is not a crime, homosexual solicitation should not be a crime either: *Pryor v Municipal Court* (1979) 25 Cal 3d 238 at 253-54; *People v Uplinger* (1984) 467 US 246; *Commonwealth v Sefranka* (1988) 382 Mass 108 at 118. It is submitted that solicitation and homosexual acts committed in public should continue to be illegal just as their heterosexual analogues are, for the protection of public sensibilities: see Jansen J (dissenting) in *Uplinger*, and the Wolfenden Report, *infra*, n 43 at 42-44 paras 115-24.

<sup>4</sup> American position: see Gerald Gunther, *Constitutional Law* (11th ed, 1988) at 586-92; John E Nowak & Ronald D Rotunda, *Constitutional Law* (4th ed, 1991) at § 14.3 pp 573-80; Gayle Lynn Pettinga, “Rational Basis With Bite: Intermediate Scrutiny by Any Other Name” (1987) 62 Ind LJ 779 at 780-85. Indian position: see Mahendra P Singh, *VN Shukla’s Constitution of India* (9th ed, 1994) at 37-75. Malaysian and Singaporean position: see Kevin Tan, Yeo Tiong Min & Lee Kiat Seng, *Constitutional Law in Malaysia and Singapore* (1991) at 598-616.

<sup>5</sup> 1992 Ed.

India: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." These provisions all share a common lineage from s 1 of the 14th Amendment of the United States Constitution: "No state shall... deny to any person within its jurisdiction the equal protection of the laws." Given the similarity in wording of the provisions, it is submitted that United States and Indian cases can assist the interpretation of Art 12(1).<sup>6</sup>

Article 12(1) embodies two distinct concepts: "equality before the law" and "equal protection of the law". The first concept bars the law from unfairly favouring one person while not disfavouring anyone else.<sup>7</sup> The latter concept applies when a person is the victim of inequality, and will be the focus of our discussion.

Equal protection of the law does not mean that everybody is to be treated in exactly the same way in the eyes of the law. Rather, when a statutory provision is alleged to be discriminatory, it is the court's duty to examine it to ensure that it treats all people in a particular class, and thus in a similar position with

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6 See G Moganasundram, "Equal Protection in Malaya – A Comparative Study" (1962) 5 *Me Judice* 56; Harry E Groves, "Equal Protection of the Laws in Malaysia and India" (1963) 12 *Amer J of Comp Law* 385. Huang Su Mien, in *Equality Before the Law – Article 8: Constitution of the Federation of Malaya* (unpublished LLM thesis, University of Singapore, 1963), writes at 5: "[T]he Indian Constitution and that of the United States, are pre-eminently suitable [for reference], since both guarantee equality to all persons in terms corresponding closely to the Malayan article, and moreover, both have the advantage of a plethora of cases attaching to their interpretation."

7 For instance, see *PP v Tengku Mahmood Iskandar* [1973] 1 MLJ 128 (HC, Malaysia) (decision of lower court overturned because it awarded defendant a lower sentence on the basis that he was a Prince of the ruling house of the State of Johore). See LA Sheridan & Harry E Groves, *The Constitution of Malaysia* (4th ed, 1987) at 58. Contrast Moganasundram, *supra*, n 6 at 56, and Huang Su Mien, "The Meaning of Equality Before the Law and Equal Protection of the Laws", *supra*, n 6 at 5-11, who find little practical difference between the two concepts.

respect to the law, in the same manner.<sup>8</sup> Equal protection cases from the United States, India, Malaysia and Singapore reveal three distinct standards of review. From the lowest to the highest standard, they are:

- (a) Rational or deferential review.
- (b) Intermediate review; and
- (c) Strict scrutiny.

Rational review may be termed the “traditional” standard of review. It was the earliest to be applied and is evident in all four jurisdictions. It is apparently the sole standard of review in India. On the other hand, American courts have gone on to develop heightened standards of review in the form of strict scrutiny, and more recently, intermediate review. Strict scrutiny has been applied in Malaysia, as will be evident from Part II of this article.

#### *A. The Traditional Standard: Rational or Deferential Review*

Under rational review, the court generally defers to legislative judgment. There is a presumption of constitutionality of the statute in question. The burden of showing that the statute is unconstitutional lies on the person alleging that it is invalid.<sup>9</sup> It is well established that for a statute to be constitutional, it must use a *rational classification* of persons founded on intelligible differentia which distinguish persons within the classification

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<sup>8</sup> *Yick Wo v Hopkins* (1886) 118 US 356 at 367; *Datuk Haji bin Harun Idris v PP* [1977] 2 MLJ 155 at 166 col 1G (FC, Malaysia); *Ong Ah Chuan v PP* [1981] 1 MLJ 64 (PC on appeal from Singapore) at 72 cols 1I-2A.

<sup>9</sup> *Shri Ram Krishna Dalmia v Shri Justice SR Tendolkar* [1958] AIR SC 538, [1959] SCR 279 at 296-97 para (b); *Datuk Haji bin Harun Idris v PP* [1977] 2 MLJ 155 (FC, Malaysia) at 166 col 2E para 9; *Malaysian Bar v Government of Malaysia* [1987] 2 MLJ 165 (SC, Malaysia) at 170 col 2F para (c).

from those left out of it. This rational classification must have a *rational nexus* or relation to the object sought to be achieved by the statute in question. This “rational nexus” test was laid down in the Indian cases of *Budhan Choudhry v State of Bihar*<sup>10</sup> and *Shri Ram Krishna Dalmia v Shri Justice SR Tendolkar*,<sup>11</sup> and followed in Malaysia by *Datuk Haji bin Harun Idris v PP*.<sup>12</sup>

The rational nexus test has been applied in Singapore. The Privy Council on appeal from Singapore in *Ong Ah Chuan v PP*,<sup>13</sup> in ruling that there was nothing unconstitutional about a mandatory death penalty for trafficking in certain quantities of controlled drugs, noted that:

Provided that the factor which the legislature adopts as constituting the dissimilarity in circumstances is not purely arbitrary but *bears a reasonable relation to the social object of the law*, there is no inconsistency with Art 12(1) of the Constitution.<sup>14</sup>

This was affirmed by the Court of Appeal in *Chng Suan Tze v The Minister for Home Affairs*.<sup>15</sup> However in two other cases, *Howe Yoon Chong v Chief Assessor, Property Tax, Singapore*<sup>16</sup>

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<sup>10</sup> [1955] AIR SC 191 at 193 (SC, India).

<sup>11</sup> *Supra*, n 9.

<sup>12</sup> *Supra*, n 9. The rational nexus test was also applied in *Malaysian Bar v Government of Malaysia*, *supra*, n 9; *R Rethana v Government of Malaysia* [1988] 1 MLJ 133 (SC, Malaysia); *Government of Malaysia v VR Menon* [1990] 1 MLJ 277 (SC, Malaysia); and *Datuk Yong Teck Lee v PP* [1993] 1 MLJ 295 (HC, Kota Kinabalu). Even before any decided cases, the applicability of rational review in Malaya based on the Indian model was predicted by several commentators: *supra*, n 6.

<sup>13</sup> [1981] 1 MLJ 64.

<sup>14</sup> *Ibid* at 72 col 2E (emphasis added).

<sup>15</sup> [1989] 1 MLJ 69 at 82D-E. See also *Teo Soh Lung v Minister for Home Affairs* [1989] 2 MLJ 449 at 459 col 1G (HC).

<sup>16</sup> [1981] 1 MLJ 51.

and *Howe Yoon Chong v Chief Assessor & Comptroller of Property Tax*,<sup>17</sup> the Privy Council did not apply the rational nexus test. Instead they held that Art 12(1) would be violated if there existed “inequalities... on a substantial scale”<sup>18</sup> or “deliberate and arbitrary discrimination”.<sup>19</sup> These pronouncements are consistent with the rational nexus test. If legislation shows “deliberate and arbitrary discrimination”, it is clear that it must fail the test.<sup>20</sup>

As rational distinctions may be made with substantially less than mathematical exactitude,<sup>21</sup> courts condone under- and over-inclusiveness in the legislature’s classifications and may even supply its own justifications for the classification in addition to objectives put forth by the government.<sup>22</sup> Therefore a provision may not be discriminatory even if the classification used catches too few or too many people needed to achieve the government’s objective. Gunther has commented that the minimal scrutiny applied in theory is virtually non-existent in fact.<sup>23</sup>

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<sup>17</sup> [1990] 1 MLJ 321.

<sup>18</sup> *Supra*, n 16 at 53 col 2B.

<sup>19</sup> *Supra*, n 17 at 324 col 1D.

<sup>20</sup> *Howe Yoon Chong v Chief Assessor & Comptroller of Property Tax* was applied in *PP v Ang Soon Huat* [1991] 1 MLJ 1 (HC, Singapore) at 6 col 2C, where the court held that “[a]rbitrariness implies the lack of any rationality.”

<sup>21</sup> *Williamson v Lee Optical Co* (1955) 348 US 483 at 489; *Shri Ram Krishna Dalmia, supra*, n 9.

<sup>22</sup> Pettinga, *supra*, n 4 at 783. On under- and over-inclusiveness, see Joseph Tussman & Jacobus tenBroek, “The Equal Protection of the Laws” (1949) 37 Calif LR 341; Huang-Thio Su Mien, “Equal Protection and Rational Classification” [1963] *Public Law* 412.

<sup>23</sup> Gerald Gunther, “The Supreme Court, 1971 Term – Foreword: Constitutional Adjudication and the Promotion of Human Rights: A Model for a Newer Equal Protection” (1972) 15 Harv Civ Rights-Civ Lib L Rev 1 at 8.

Yet even a provision which satisfies the rational nexus test may be invalid because the object sought to be achieved by the statute is itself inherently bad.<sup>24</sup> This limitation finds support in United States and Indian case law. In *Bidi Supply Co v Union of India*<sup>25</sup> Bose J held:

[O]ne can conceive of classifications. . . that will have direct and reasonable relation to the object sought to be achieved and yet which are bad because... the object itself is not to be allowed on the ground that it offends Article 14. In such a case the object itself must be struck down and not the mere classification which after all, is only a means of attaining the end desired.

#### B. *The New Standard: Strict Scrutiny*<sup>26</sup>

In the first 80 years after the enactment of the 14th Amendment of the Constitution, the United States Supreme Court believed that the Amendment protected only racial and ethnic minorities from discrimination.<sup>27</sup> But the 1940s saw the doctrine of strict scrutiny conceived, and it was developed during the term of Chief Justice Earl Warren in the 1960s. Its source was Stone CJ's famous fourth footnote in *United States v Carotene Products Co*,<sup>28</sup> which said that courts must use a "more searching judicial inquiry" to protect groups that do not have the ordinary protection of democratic rule because they are not able to participate effectively in the political process.

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<sup>24</sup> Huang-Thio Su Mien, *supra*, n 22 at 422, 440. See also the cases cited at 422-29.

<sup>25</sup> [1956] AIR SC 479 at 486 para 18.

<sup>26</sup> Pettinga, *supra*, n 4 at 780-82.

<sup>27</sup> *Strauder v West Virginia* (1880) 100 US 303, *Yick Wo v Hopkins* (1886) 118 US 356.

<sup>28</sup> (1938) 304 US 144 at 152 n 4.



The Warren Court did not abandon rational review, but applied it alongside strict scrutiny in a two-tier approach. Strict scrutiny is only invoked when a statute either (1) impinges on the fundamental rights and interests of people, thus violating due process; or (2) makes use of a “suspect classification”.<sup>29</sup> It has been argued in the United States that anti-sodomy statutes violate due process by affecting the fundamental right of privacy of homosexuals; this argument found its way to the United States Supreme Court but was rejected in the important decision of *Bowers v Hardwick*.<sup>30</sup> We will not concentrate on this aspect of strict scrutiny but on whether homosexuals constitute a suspect class.

Unlike rational review, the burden of proof in strict scrutiny is reversed: it is the government that must prove that the impugned statute is constitutional. To survive strict scrutiny, a suspect classification in a statute must be “necessary to the accomplishment”<sup>31</sup> of a “compelling state interest”.<sup>32</sup> While absolute necessity is not required, the court will require a close relationship or “tight fit” between the classification and promotion of the compelling governmental objective of the statute.<sup>33</sup> The government’s policy must be the least restrictive possible. At present the United States Supreme Court recognises two suspect classifications: race or national origin, and alienage.

### 1. *Indicia of a Suspect Class*<sup>34</sup>

American cases have established several indicia which point towards

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<sup>29</sup> Gerald Gunther, *Constitutional Law* (11th ed, 1985) at 588.

<sup>30</sup> (1986) 478 US 186.

<sup>31</sup> *McLaughlin v Florida* (1964) 379 US 184 at 192.

<sup>32</sup> *Plyler v Doe* (1982) 457 US 202 at 217.

<sup>33</sup> Nowak & Rotunda, *supra*, n 4 at 575 § 14.3.

<sup>34</sup> See generally, Note, “Quasi-Suspect Classes and Proof of Discriminatory

a suspect class. None of the indicia is by itself conclusive, but a group of persons which possesses most of them is probably a suspect class. The indicia are:

- (a) A history of discrimination and stigma or opprobrium.
- (b) The presence of incorrect stereotypes perpetuated by the impugned law.
- (c) The immutability of the defining trait of the group.
- (d) The fact that the group is a “discrete and insular minority”.

(1) *History of Discrimination, Stigma or Opprobrium*: A “history of purposeful unequal treatment”,<sup>35</sup> stigma or opprobrium is a mark of a suspect class. A group possessing a particular trait is unfairly stigmatized if legislation excludes its members from the political process or treats its members as persons of inferior status because of the trait. Stigma is defined not only by an individual’s subjective feelings of being stigmatized, but also by societal attitudes towards individuals with the trait in question. People who are stigmatized may even be psychologically damaged by the way they are treated.<sup>36</sup>

A history of discrimination and stigma is not by itself sufficient to trigger heightened scrutiny because it does not show if the discrimination is unwarranted.<sup>37</sup> For example, criminals have long

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Intent: A New Model” (1981) 90 Yale LJ 912 at 917-19; Harris M Miller II, “An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality” (1984) 57 S Cal LR 797 at 809-16; Note, “The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification” (1985) 98 Harv L Rev 1285 at 1299-1305.

<sup>35</sup> *San Antonio Independent School District v Rodriguez* (1973) 411 US 1 at 28-29.

<sup>36</sup> Yale LJ, *supra*, n 34 at 917-18.

<sup>37</sup> John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980) at 250 n 64.

faced discrimination and stigma but discrimination against them is justified either as a penalty or a safeguard.

Homosexuals as a class are generally stigmatized and denigrated by many in society. In some countries this has taken serious forms such as employment discrimination and “queer-bashing”.

(2) *Incorrect Stereotypes*: If a group is subjected to legal disabilities on the basis of stereotyped characteristics which do not truly indicate their abilities,<sup>38</sup> or laws which perpetuate incorrect stereotypes,<sup>39</sup> this suggests that the group is a suspect class. This indicium is not conclusive because all legislative decisions are to some degree based on stereotypes and so counter-examples can always be found.<sup>40</sup>

Homosexuals are subject to many unfounded and highly de-meaning stereotypes.<sup>41</sup> For instance, they are often characterised as being effeminate, likely to sexually assault or outrage the modesty of defenceless children and to seduce “straight” males into becoming gay, or to present role models that make homosexuality so attractive that young people will embrace it as a lifestyle.

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<sup>38</sup> *Massachusetts Board of Retirement v Murgia* (1976) 427 US 307 at 313.

<sup>39</sup> *Mississippi University for Women v Hogan* (1982) 458 US 718 at 729-30 (nursing school policy of excluding men perpetuated stereotyped notion of nursing as a “woman’s job”).

<sup>40</sup> Ely, *supra*, n 37 at 155-56.

<sup>41</sup> In addition to the examples cited in the main text, note *R v Bishop* [1975] QB 274 in which the defendant was tried for theft from a bedroom. He explained the presence of his fingerprints in the bedroom by claiming that he had a homosexual relationship with one of the prosecution’s witnesses (which was denied). The Court of Appeal held that since an allegation of homosexual immorality reflected on the credibility and reliability of the prosecution witness, this fell within s 1(f)(ii) of the UK Criminal Evidence Act 1898 entitling the prosecution to cross-examine the defendant on his own criminal record. Is it correct to assume that the testimony of a homosexual is less reliable than that of a heterosexual?

But arguments that homosexuals as a class disproportionately molest children have been discredited.<sup>42</sup> Though pedophilia and homosexuality may overlap, they are distinct conditions. The appropriate way to prevent sexual abuse of children is to criminalise pedophilia, not sodomy.<sup>43</sup> The rape and the outraging of

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<sup>42</sup> In 1994, the police reported 405 cases of child sexual abuse in Singapore, although professionals working with abused children feel that there may have been more than 1,215 because of underreporting. Victims are usually under 10, and the abusers are often their fathers or stepfathers. Studies show that the rate of female child sexual abuse is higher than that for males – a figure of 10 to 1 has been suggested: “Daddy, Don’t: Child Sex Abuse: Almost Always in the Family”, *Life!*, 5 August 1995 at 2. However the difference is not nearly as great as thought. It has been speculated that underreporting of male child sexual abuse is due *inter alia* to the male ethic of self-reliance, the stigma of homosexuality and tendency towards self-blame, and a feared disbelief or unresponsiveness of parents and professionals. In male sexual abuse cases most perpetrators are men, though the number of female perpetrators is also severely underestimated, probably because males are likely to see childhood sexual activity with older females not as “abuse” but as benign or even positive: Matthew Parynik Mendel, *The Male Survivor: The Impact of Sexual Abuse* (1995) at 40-71. Surprisingly, of the men who perpetrate sexual abuses against boys, the vast majority identify themselves as heterosexual: John C Gonsioreh, Walter H Bera, Donald LeTourneau, *Male Sexual Abuse: A Trilogy of Intervention Strategies* (1994) at 47. While correlational research suggests that male sexual abuse victims are twice as likely to engage in homosexual behaviour, commentators stress that no direct causal factor has been determined. It is suggested that pedophiles may take advantage of the vulnerabilities of young males who already have incipient homosexual tendencies: Mendel, at 169-72; Gonsioreh *et al*, at 48.

<sup>43</sup> *Report of the Committee on Homosexual Offences and Prostitution* (Cmnd 247, 1957) (the Wolfenden Report) at 23 para 57. Committing or abetting the commission of, or procuring or attempting to procure the commission by any person of, any obscene or indecent act with any child or young person is a criminal offence under s 6 of the Children and Young Persons Act (Cap 38, 1994 Ed). By s 2 of the Act, a “child” is a person below age 14 while a “young person” is 14 or above and below 16. More serious offenders can be charged under the Penal Code (Cap 224, 1985 Rev Ed) or Women’s Charter (Cap 353, 1985 Rev Ed).

modesty of adults are also more properly punished by specific offences, not by a sanction which impacts on private homosexual behaviour.<sup>44</sup>

To suggest that homosexuals can seduce straight men into becoming gay implies that the homosexual preference in men is strong while the heterosexual preference is weak, such that if faced with a choice they would reject their heterosexuality. There is no evidence that this is so. It is highly improbable that a straight man who is repulsed by homosexual behaviour would find it any less repugnant if he were propositioned by a gay man. The mere exposure to a gay person probably does not affect a child's sexual orientation, which is most likely established early in life and not consciously acquired.<sup>45</sup>

(3) *Immutability*: The primary aim of legislation is to influence people's choices and activities. By making a certain activity a crime, the legislature hopes to deter persons from engaging in that activity. The immutability of a trait is relevant because it may be unfair to inflict legal burdens on persons with a particular trait if they are not responsible for or have no control over that trait.<sup>46</sup> It also tends to show that legislators, being unable to become members of the group, are less able to properly identify with the group's interests and thus are more likely to be biased by their own perspectives.<sup>47</sup> If the legislature differentiates between persons on the basis of such immutable traits this may suggest that it acts in bad faith.<sup>48</sup> Furthermore, the immutability of a

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<sup>44</sup> Under Penal Code, ss 375-76, the offence of rape is only committed if the victim is female. Sexual assault on a male victim is only punishable under ss 377 or 377A. Outraging of modesty is punishable under ss 354 and 354A.

<sup>45</sup> Miller, *supra*, n 34 at 822.

<sup>46</sup> *Ibid* at 813.

<sup>47</sup> Ely, *supra*, n 37 at 160.

<sup>48</sup> Yale LJ, *supra*, n 34 at 918.

trait heightens the group's stigma since no one would choose to belong to the group if he or she could help it.<sup>49</sup>

Immutable traits can be physical (*eg* skin colour) or relational (illegitimacy). In addition, *Watkins v United States Army* held that a trait so central to a person's identity that government penalisation for refusing to alter it would be abhorrent can be considered as immutable.<sup>50</sup> This confirms an indicium of a suspect class suggested by a commentator<sup>51</sup> before the *Watkins* decision: that the group's defining characteristic must be essential to personhood, *ie* it must be essential to individual identity, group identity, and to society's perception of those identities.

Immutability is not a conclusive sign for a suspect class. Some established suspect classes (*eg* alienage) are not immutable, while some immutable characteristics (*eg* physical disability and intelligence) are accepted as legitimate as means of distinguishing between persons.<sup>52</sup> Besides, immutability only positively eliminates classifications based on traits which are clearly impossible for individuals to change (such as race), since the government cannot justify the classification on the ground that it will discourage people from joining the group.<sup>53</sup>

The origins and mutability of sexual preference are greatly

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<sup>49</sup> Harv L Rev, *supra*, n 34 at 1302-3.

<sup>50</sup> (1988) 847 F 2d 1329 at 1347 (CA, 9th Cir) (since homosexuals are a suspect class, Army's policy of administratively discharging or refusing to re-enlist them fails strict scrutiny and violates equal protection). When this decision was reheard *en banc* in *Watkins v United States Army* (1989) 875 F 2d 699 the court affirmed the case on grounds of equitable estoppel. However, Norris J, while concurring with the final decision, agreed with the dissenting judges that equitable estoppel was inapplicable. Instead he followed his reasoning in the earlier decision with regard to equal protection.

<sup>51</sup> Harv L Rev, *supra*, n 34 at 1300.

<sup>52</sup> Yale LJ, *supra*, n 34 at 918.

<sup>53</sup> Ely, *supra*, n 37 at 155.

disputed.<sup>54</sup> Scientists are divided over whether homosexuality is a result of genetics, a product of early childhood experiences, a result of the interaction between genetic predisposition and life experiences, free choice, or a combination of all the factors.

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<sup>54</sup> Although one recent study concludes that there may be a difference in brain structure based on sexual orientation (Simon LeVay, "A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men" (1991) 253 *Science* 1034), while others posit a genetic difference (eg JM Bailey & RC Pillard, "A Genetic Study of Male Sexual Orientation" (1991) 48 *Arch Gen Psych* 1089; JM Bailey & RC Pillard *et al*, "Heritable Factors Influence Sexual Orientation in Women" (1993) 50(3) *Arch Gen Psych* 217), they have been criticised on credible grounds. LeVay and Pillard claimed that they found the INAH3 portion of the hypothalamus to be nearly three times as large in the brains of heterosexuals than in homosexuals. But the measurement of brain structure is notoriously difficult and controversial – neuroscientists disagree on whether the most meaningful gauge is volume (LeVay's method) or the number of neurons. Also, homosexual behaviour may determine brain development instead of the other way round: Joe Dallas, "Born Gay?" *Christianity Today*, 22 June 1992 at 20; see also Thomas J Ward & Frederick A Swarts, "The Mainstreaming of Homosexuality" (1993) 8(10) *The World & I* 365 at 369-74. In any case, what is inborn is not necessarily normal, eg genetic defects and deformities: Dallas, *ibid*.

The immutability of homosexuality is also challenged by the more than 100 organisations around the world who help people overcome homosexuality. One such organisation, a Christian ministry called Choices associated with the Church of Our Saviour, Singapore, was founded by former homosexual Sinclair Rogers in 1991. The ministry builds upon the Biblical promise of redemption from homosexuality: "Do not fool yourselves, people who are... homosexual perverts... – none of these will possess God's Kingdom. Some of you were like that. But you have been purified from sin... you have been put right with God by the Lord Jesus Christ and by the Spirit of our God.": 1 Cor 6:9-11. In a letter to *The Straits Times*, 24 December 1992 at 18, Rogers wrote, "There is growing clinical evidence to indicate that homosexual tendencies need not be life-controlling. Research by experts in the field of neuro-psychiatry and psycho-hormonal research makes it clear that for those who are involved and persevering, homosexual behaviour can be stopped, and homosexual impulses reduced, and for many, almost eliminated regardless of any biological influence. [W]hile biology may indeed influence, it does not pre-programme us into hapless automatons, devoid of will, conscience or choice."

But it is not disputed that it is very difficult for a person to change his sexual orientation. It is therefore suggested that homosexuality, for equal protection purposes, can be treated as an “immutable” characteristic.

Sexual orientation can also be considered “immutable” because it is essential to all three aspects of personhood. A gay person’s sexuality is what makes him perceive himself as different from others; thus it is a strong feature of his personal identity. Homosexuality is also the marker distinguishing gays as a group from other groups in society, showing that it is essential to the group’s identity and to society’s perception of the group.<sup>55</sup>

(4) *Discreteness and Insularity*: This indicium arose out of Stone CJ’s fourth footnote in *United States v Carotene Products Co.*<sup>56</sup> He said:

[P]rejudice against discrete and insular minorities may be a special condition which tends seriously to curtail the operation of those political processes ordinarily to be relied on to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

A discrete and insular minority with views different from the majority in the legislature and executive lacks the clout needed to prevent the implementation of legislation and policies which cause hardship to it. It is politically powerless. Hence the remaining branch of government – the court – has a duty to protect it by subjecting legislation affecting the minority to strict scrutiny. *Minority* here refers to a minority in the political process, not a minority of the population. For instance, women form about 50% of the population but are under-represented in the political bodies enacting and enforcing laws, and so form a protected

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<sup>55</sup> Harv L Rev, *supra*, n 34 at 1304-5.

<sup>56</sup> *Supra*, n 28.



class.<sup>57</sup> This indicium is not conclusive because it does not on its own show which minorities should receive protection, making it easy for any legislative loser to depict itself as a “politically powerless minority”.

Discreteness and insularity are also relevant because they have a social component. If the majority has greater social contact with a minority, this diminishes the hostility that often comes with unfamiliarity and curbs the majority’s tendency to exaggerate its superiority. The more we get to know people who are different in some ways, the more we begin to realise the ways in which they are the same. This is the beginning of political co-operation.<sup>58</sup> But homosexuals are anonymous and diffuse throughout the population. It is this anonymity that makes them a discrete and insular minority. Strong prejudice against gays compels most to remain hidden for fear of losing their reputation and livelihood. John Hart Ely feels that it is this combination of prejudice and lack of visible outward signs of homosexuality that makes it a suspect class, because it diminishes the likelihood that the majority’s hostility against gays will be neutralised by greater social contact.<sup>59</sup>

In any case, Ely points out that political access is important but cannot alone protect a group against hostility nor correct the unfair biases of the majority. Even if minorities gain a political voice, prejudices can always survive and even be exacerbated; other groups may refuse to deal with the minority; or the minority may simply be consistently outvoted in the democratic process.<sup>60</sup> Therefore even if a group attains an “appropriate” share of political power, strict scrutiny is still necessary if prejudice against them persists.

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<sup>57</sup> Miller, *supra*, n 34 at 815.

<sup>58</sup> Ely, *supra*, n 37 at 161.

<sup>59</sup> *Ibid* at 163.

<sup>60</sup> *Ibid* at 161.

## 2. *Proof of Discrimination*

Once a group is established to be a suspect class, to prove discrimination it must be shown that (1) the law has a disproportionate impact on the suspect class; and (2) the legislature, in enacting the impugned provision, acted with discriminatory intent.<sup>61</sup> Discriminatory intent must be proved by direct and not just circumstantial evidence. The legislative or administrative history of a law or policy, especially contemporaneous statements by officials, minutes of meetings, reports and testimony as to the motivation behind the decision are direct evidence of discrimination. On the other hand, the historical background of a decision (especially if revealed in a series of purposefully discriminatory actions), the specific sequence of events preceding the challenged law or policy, and departures from normal procedures or substantive criteria are only circumstantial evidence.<sup>62</sup> In effect, what a plaintiff must do is to show that the legislature intended to discriminate against him or her. It is not enough to show the discrimination was just a foreseeable side-effect of the provision.

Such a high standard of proof is required because strict scrutiny almost always leads to invalidation of the law under review, so frequent use of it is disruptive to the government trying to achieve its objectives. Secondly, it is members of the legislature, not the judiciary, who are the elected representatives of the people, so the court must guard against excessive judicial interference with legislative action. Thirdly, a low standard of proof might undesirably cause the legislature to unconsciously treat suspect classes differently where laws and policies are laid down, thus perpetuating their sense of separateness and isolation.<sup>63</sup>

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<sup>61</sup> *Washington v Davis* (1976) 426 US 229 at 242-45.

<sup>62</sup> *Village of Arlington Heights v Metropolitan Hous Dev Corp* (1977) 429 US 252 at 267-68.

<sup>63</sup> Yale LJ, *supra*, n 34 at 923-24.

### C. *The New Standard: Intermediate Review*<sup>64</sup>

The rigid two-tier system of equal protection is not completely satisfactory as it excludes groups which are discriminated against on grounds other than race and alienage. This has led the United States Supreme Court to develop intermediate scrutiny,<sup>65</sup> a standard not as stringent as a “compelling interest” but involving far less deference to the legislature than rational review.

Intermediate review requires that the classification used need only be “substantially related” to the achievement of “important governmental objectives”.<sup>66</sup> The court looks more closely at the ends and means of the challenged statute instead of merely pronouncing it valid or invalid under traditional analysis.<sup>67</sup> The court will not accept as legitimate every objective of the statute advanced by the government, and if the objective can be achieved through alternative means which do not disadvantage the quasi-suspect class, the court will prompt the legislature to use these alternative means by invalidating the legislation.

#### 1. *Indicia for a Quasi-Suspect Class*

Intermediate scrutiny is closely related to strict scrutiny. A group qualifies as a quasi-suspect class if it shares at least some of the indicia for suspectness. Another non-conclusive factor is the presence of a significant overlap between the group in question and other classes which have been established by the courts as suspect.<sup>68</sup> Discrimination based on gender and illegitimacy have been identified as warranting intermediate scrutiny in the United States.

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<sup>64</sup> Nowak & Rotunda, *supra*, n 4 at 576-77 § 14.3.

<sup>65</sup> *Craig v Boren* (1976) 429 US 190 at 210-11.

<sup>66</sup> *Ibid* at 197.

<sup>67</sup> *Plyler v Doe*, *supra*, n 32 at 218 n 16.

<sup>68</sup> Yale LJ, *supra*, n 34 at 916, 919.

Members of quasi-suspect groups justify only intermediate review because they suffer less societal prejudice than fully-suspect classes.<sup>69</sup> Neither do they completely lack political power. While women may be discriminated against in some ways, they constitute roughly 50% of voters and so possess a measure of political power. Similarly, illegitimate children grow up into voting adults. Furthermore, it is sometimes necessary for the government to use quasi-suspect classifications to distinguish between persons: for example, statutes treating women differently from men may be justified because it may be inappropriate for women to perform some tasks that men perform, such as combat.<sup>70</sup>

Intermediate scrutiny is relevant to homosexual conduct, for it may be appropriate to allow discrimination against homosexuals on some grounds but not on others.

## 2. *Proof of Discrimination*

The standard of proof for discriminatory intent developed in cases involving suspect classes also applies to claims by quasi-suspect classes. Therefore mere evidence of a disproportionate impact on a quasi-suspect class which is a natural and foreseeable consequence of a given action is insufficient to establish a discriminatory purpose.<sup>71</sup> However one commentator has suggested that such a high standard of proof is not required for quasi-suspect classes because many more laws can withstand intermediate review than strict scrutiny, so intermediate review is unlikely to lead to widespread invalidation of laws and the paralysis of the legislature. The judiciary is thus unlikely to be blamed for trespassing into the legislature's domain. Since legislators can relatively easily tailor

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<sup>69</sup> *Eg Mathews v Lucas* (1976) 427 US 495 at 505-6 (illegitimate children suffer less prejudice than racial minorities and women).

<sup>70</sup> Pettinga, *supra*, n 4 at 184 n 58.

<sup>71</sup> *Personnel Administrator v Feeney* (1979) 442 US 256 at 271-74, 278-79.

statutes to bear a fair and substantial relation to an important governmental goal, undue consciousness of disfavoured classifications is unlikely to occur.

Under this “new model” proof of discriminatory intent, once members of a quasi-suspect class can prove disproportionate impact, they establish *prima facie* equal protection violation by adducing only circumstantial evidence of intent such as evidence that the impact is foreseeable, severe and uniformly persistent over a period of time. The burden then shifts to the government to show that it acted without discriminatory intent or that the law is well-designed to serve other important goals.<sup>72</sup>

#### D. Heightened Scrutiny Applied to Homosexuals<sup>73</sup>

The United States Supreme Court has yet to pronounce whether anti-sodomy statutes violate equal protection. But in *Baker v Wade*,<sup>74</sup> the Court of Appeals for the 5th Circuit held that homosexuals are not a suspect or quasi-suspect class, and applied rational review to a Texas statute criminalising homosexual sodomy. It reached this conclusion because no cases were cited to show that homosexuals constitute a suspect or quasi-suspect class, and by applying *Doe v Commonwealth's Attorney*,<sup>75</sup> a binding Supreme Court decision which apparently decided that engaging in homosexual conduct is not a constitutionally protected liberty interest. *Baker* went on to find that the statute bore a rational relation to the state's goal of implementing morality, given the strong objections to homosexual conduct that had historically prevailed

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<sup>72</sup> See Yale LJ above, n 34 at 922, 924, 927.

<sup>73</sup> John Charles Hayes, “The Tradition of Prejudice Versus the Principle of Equality: Homosexuality and Heightened Equal Protection Scrutiny After *Bowers v Hardwick*” (1990) 31 Boston Coll LR 375.

<sup>74</sup> (1985) 769 F 2d 289.

<sup>75</sup> (1976) 425 US 901.

in Western culture. In denying a petition for a rehearing,<sup>76</sup> the court again rejected an equal protection claim, reasoning that the statute proscribed conduct, not a class, and that those who engaged in the conduct did so by choice. The government could legitimately decide that certain forms of conduct are wrong, and it was not for the courts to resolve moral questions.

It is submitted that *Baker* should not be followed. Instead of determining if homosexuals are a suspect class by applying the indicia laid down by the Supreme Court, the court relied on *Doe*. *Doe* was a summary affirmation of a district court decision by the Supreme Court. No opinion was rendered. The Supreme Court itself has ruled that a summary affirmation is of less value as a precedent than a decision on the merits of a case.<sup>77</sup> In *Hardwick v Bowers*<sup>78</sup> Johnson J writing for the majority stated that the summary affirmation of *Doe* was not binding precedent and not conclusive in settling the constitutionality of anti-sodomy laws. It is also unclear from a summary affirmation whether a higher court means to approve of only the decision of a lower court, or its reasoning also.<sup>79</sup> Furthermore, although anti-sodomy laws criminalise conduct and not homosexuals as a class, they have a disproportionate impact on homosexuals.<sup>80</sup> And it is arguable that anti-sodomy laws do not stand up even to rational review because their objectives are inherently obnoxious.

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<sup>76</sup> (1985) 774 F 2d 1285; certificate for appeal refused (1986) 478 US 1022, 478 US 1035.

<sup>77</sup> *Edelman v Jordan* (1974) 415 US 651 at 671.

<sup>78</sup> (1985) 760 F 2d 1202 at 1207-8 (CA, 11th Cir). Although reversed by *Bowers v Hardwick*, *supra*, n 30, the Supreme Court stated that it did not have to resolve the *Doe* dispute, preferring to give plenary consideration to the merits of *Bowers* rather than rely on *Doe*.

<sup>79</sup> Mark John Kappelhoff, "*Bowers v Hardwick*: Is There a Right to Privacy?" (1988) 37 Amer Univ LR 487 at 502 n 115.

<sup>80</sup> On disproportionate impact, *supra*, n 61 and the accompanying text.

In decisions involving employment discrimination against homosexuals, some courts have held that homosexuals constitute a protected class<sup>81</sup> while others have not.<sup>82</sup> The reason for this divergence is that the latter line of cases hold that the Supreme Court's refusal in *Bowers v Hardwick*<sup>83</sup> to recognise a due process privacy right to engage in homosexual conduct prevents the granting of protected class status to homosexuals under equal protection doctrine, since to do so would undermine *Hardwick*. But *Hardwick* has been severely criticized<sup>84</sup> as being out of line with other Supreme Court decisions developing the right to privacy.<sup>85</sup> Also, *Hardwick* was based purely on due process doctrine, the Supreme Court expressly stating that its conclusion did not deal with equal protection principles.<sup>86</sup> Therefore the case does not prevent a plaintiff from challenging statutes on equal protection

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<sup>81</sup> *High Tech Gays v Defense Industry Security Clearance Office* (1987) 668 F Supp 1361 (considers homosexuals a quasi-suspect class, though giving no reasons why it is not a fully-suspect class); *Watkins v United States Army* (1988) 847 F 2d 1329 (CA, 9th Cir) (considers homosexuals a fully-suspect class).

<sup>82</sup> *Eg Padula v Webster* (1987) 822 F 2d 97 (CA, DC Cir); *Woodward v United States* (1989) 871 F 2d 1068 (CA, Fed Cir); *Ben-Shalom v Marsh* (1989) 881 F 2d 454 (CA, 7th Cir).

<sup>83</sup> *Supra*, n 30.

<sup>84</sup> *Eg Kappelhoff, supra*, n 79; Laurence H Tribe, *American Constitutional Law* (2nd ed, 1988) at 1423 § 15-21; *Cf* Alan J Wertjes, "Behind the Facade: Understanding the Potential Extension of the Constitutional Right to Privacy to Homosexual Conduct" (1986) 64 Wash U LQ 1233.

<sup>85</sup> Notably *Criswold v Connecticut* (1965) 381 US 479 (law prohibiting use of contraceptives by married couples infringes constitutional right to privacy); *Stanley v Georgia* (1969) 393 US 557 (law prohibiting private possession of pornographic materials unconstitutional); *Eisenstadt v Baird* (1972) 405 US 438 (constitutional right to privacy extends to contraceptive use by unmarried persons); *Roe v Wade* (1973) 415 US 113 (constitutional right to privacy includes right of a woman to terminate her pregnancy).

<sup>86</sup> *Hardwick* at 198 n 8.

grounds. There is no reason why a statute cannot violate one Article of the Constitution while not affecting another. It has been suggested that due process doctrine protects only traditional practices and conventions from attack by political majorities in power, whereas equal protection protects disadvantaged groups from discriminatory legislation and policies even if deeply-ingrained and traditional.<sup>87</sup> In any case *Hardwick* is not binding on Singapore courts.

## II. HEIGHTENED SCRUTINY IN SINGAPORE AND MALAYSIA

Local academics, citing Indian and American cases, suggest that in Singapore and Malaysia there exist “forbidden classifications” on which no legislation may be based, even if the rational nexus test is satisfied.<sup>88</sup> Forbidden classifications are in fact suspect classifications under the doctrine of strict scrutiny.<sup>89</sup> Unlike the United States, certain forbidden classifications are explicitly stated in the constitutions of India, Malaysia and Singapore. To invalidate legislation based on such classifications it is only necessary to cite the appropriate Article. In Singapore, Art 12(2) lists religion, race, descent and place of birth<sup>90</sup> as characteristics which cannot

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<sup>87</sup> Cass R Sunstein, “Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection” (1988) 55 U Chicago LR 1161, especially at 1163; Hayes, *supra*, n 73 at 468-69. This was applied by *Watkins v United States Army* at 1340, 1349, 1352. Cf Laurence H Tribe & Michael C Dorf, *On Reading the Constitution* (1991) at 115-16, disagreeing with Sunstein.

<sup>88</sup> Huang Su Mien, *supra*, n 6 at 138-63 Ch VI (“Forbidden classifications”); Tan, Yeo & Lee, *supra*, n 4 at 615.

<sup>89</sup> *Eg* Tribe, *supra*, n 84 at 1466 § 16-14, treats forbidden classifications as suspect classifications.

<sup>90</sup> Gender or sex is a notable omission from this list; cf Indian Constitution Arts 15 and 16. In 1963, Hickling wrote, “[T]he absence of that short and



form the basis of classification for legislation, appointment to any office, public employment, the administration of property, or the establishment or carrying on of any trade, business, profession, vocation or employment. Article 16(1) states that Singapore citizens cannot be discriminated against on these same grounds in respect of education.

Since sexual orientation is not one of the categories in Art 12(2), classifications based on it are not expressly forbidden in Singapore. But the categories of forbidden classifications are not closed by this list of prohibited criteria.<sup>91</sup> It is always open to the court to discover new suspect classifications under Art 12(1). Although Art 12(2) says that there shall be no discrimination “on the grounds only” of religion, race, descent or place of birth, the word *only* cannot mean that all the possible forbidden classifications are listed in Art 12(2) and that there are no others.<sup>92</sup> Such a view

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dreadful word, ‘sex’, from Article 8 of the Constitution is probably regarded as sufficient to keep the male sex dominant in the Federation, at least in the field of civil service.”: RH Hickling, “Some Aspects of Fundamental Liberties under the Constitution of the Federation of Malaysia” (1963) 29 MLJ xliv at xlix. This foreshadowed the recent controversy over equal rights for women civil servants. At present the spouses and dependent children of male civil servants obtain medical benefits, while those of female civil servants do not. The Minister of Finance Dr Richard Hu informed Parliament that the government was sticking to the status quo because of the principle that the husband is head of the household in Asian societies. “It is the husband’s responsibility to look after the family’s needs, including their medical needs. This is how our society is structured. It would be unwise to tamper with this structure”: *The Straits Times*, 12 November 1993 at 26. This provoked reactions from journalists, politicians, civil servants and groups such as the Singapore Council of Women’s Organisations (SCWO) and the Association of Women for Action and Research (AWARE): *The Straits Times*, 17 November 1993 at 29, 19 November 1993 at 37, 25 November 1993 at 30, 27 November 1993 at 35, 29 November 1993 at 27, 4 December 1993 at 27, 12 December 1993 at 2, 22 August 1994 at 1, 24.

<sup>91</sup> Huang Su Mien, *supra*, n 6 at 140.

<sup>92</sup> Authorities suggest that the phrase *on the grounds only* has two possible

derogates from the breadth of Art 12(1) and is inconsistent with the approach to constitutional interpretation in *Ong Ah Chuan v PP*, that Part IV of the Constitution should be given “a generous interpretation, avoiding what has been called ‘the austerity of tabulated legalism’, suitable to give to individuals the full measure of the [fundamental liberties] referred to.”<sup>93</sup> Instead, Art 12(2) should be seen as a specific application of the general principle laid down in Art 12(1), a legislative attempt to outlaw classifications which it finds particularly insidious. It is submitted that the presence of forbidden classifications in Art 12(2) coupled with the general right of equal protection in Art 12(1) suggests that heightened scrutiny applies in Singapore.

The applicability of strict scrutiny in Malaysia was affirmed by *Malaysian Bar v Government of Malaysia*.<sup>94</sup> In that case, s 46A(1)(a) of the Malaysian Legal Profession Act 1976 restricted membership of the Bar Council, State Bar Committee and any committees of the Bar Council and Bar Committee to advocates and solicitors of not less than seven years’ standing. Among other

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interpretations: (1) it could mean that the prohibited ground should not be the sole consideration for discriminatory treatment: *PP v Datuk Harun bin Haji Idris* [1976] 2 MLJ 116 at 119 col 1E (HC, Kuala Lumpur): “The use of the word ‘only’ in Art 8(2) connotes that what is discountenanced is discrimination purely and solely on account of all or any one or more of the grounds mentioned in the clause. A discrimination based on any of these grounds and also on other grounds is not affected by Art 8(2) though it may be hit by Art 8(1)”; see also Huang Su Mien, *supra*, n 6 at 138-63; Singh, *supra*, n 4 at 73-74; (2) it could also mean that the effect of a statute and not its purpose or motive is the determining factor: *State of Bombay v Bombay Education Society* [1954] AIR SC 561 (interpreting a similar phrase in Art 29(2) of the Indian Constitution); *Yusuf Abdul Aziz v State of Bombay* [1954] AIR SC 321; see Singh, *ibid*. No case has ever interpreted the phrase as limiting the concept of equal protection to only the forbidden classifications explicitly stated in the Constitution.

<sup>93</sup> *Supra*, n 13 at 70 cols 2C-E.

<sup>94</sup> [1987] 2 MLJ 165 (SC, Malaysia).

things, this provision was alleged to violate the equal protection clause of Art 8(1) (Singapore's Art 12(1)) by denying lawyers of less than seven years' standing representation in the governing bodies of the profession. Counsel for the Malaysian Bar urged the court to adopt strict scrutiny instead of rational review to the provision. Although the Malaysian Bar's appeal ultimately failed, both the majority and dissenting judges in the case accepted the application of strict scrutiny in Malaysia.

We deal first with the dissenting decision of Lord President Salleh Abas. After an investigation into the development of strict scrutiny in the United States, he concluded:

The general principle culled from the authorities and judicially determined, succinctly put, is that Article 8(1) permits reasonable classification founded on intelligible differentia having a rational relation or nexus with the policy or object sought to be achieved by the statute or statutory provision in question. . . . *If however the court determines that the challenged statutory classification affects a fundamental right or is drawn on the basis of suspect criteria, then a mere rational connection between the selected legislative goal and the enacted legislative differentiation will not suffice per se, and in such a case a stricter scrutiny and a higher degree of precision than ordinarily required will be necessary.*

But he commented: "In reality the treatment of suspect classification does not differ much from the traditional test as both are primarily concerned with the question of whether or not there is a reasonable basis for the classification."<sup>95</sup>

The majority judgment was given by Mohamed Azmi SCJ, with whom Wan Hamzah SCJ agreed. In his view, the classification satisfied the rational nexus test, and even the "legitimate or compelling state or governmental interest" test required in the United States,<sup>96</sup> *ie* the strict scrutiny test. However, he mentioned that:

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<sup>95</sup> *Ibid* at 168 cols 1H-2C (emphasis added).

<sup>96</sup> *Ibid* at 171 col 1G, 172 col 2H.

there is no question of discarding the traditional or simple approach in favour of the suspect classification, for in reality both are primarily concerned with the question of whether or not there is a reasonable or permissible basis for the classification, and that for such determination the court must review the real object of the legislation.<sup>97</sup>

The highest court in Malaysia has thus recognised that greater scrutiny is justified when legislation unfairly burdens a suspect class. However it is respectfully submitted that the court misapplied the doctrine. While it correctly identified that in both rational and strict scrutiny there exists a nexus between the classification and the object of the legislation, it erred in arguing that there is really only one standard of review. This fails to recognise that courts perform quite different functions when they virtually prohibit governmental use of classifications in strict scrutiny, examine the legitimacy of classifications under intermediate review, and presume the constitutionality of classifications under rational review.<sup>98</sup>

Neither does strict scrutiny replace rational review, as Mohamed Azmi and Wan Hamzah SCJJ seemed to believe. Few groups are likely to qualify for suspect class status. In fact, the attempt by counsel for the Malaysian Bar to elevate lawyers of less than seven years' standing to a suspect class rightly failed. Less-experienced lawyers do not constitute a suspect class since experience in the legal profession does not satisfy the required indicia.<sup>99</sup> The section clearly did not trigger strict scrutiny at all. Mohamed Azmi SCJ applied strict scrutiny incorrectly when he stated that the impugned section satisfied the "legitimate or compelling state or governmental interest" test.

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<sup>97</sup> *Ibid* at 171 cols 1B-D.

<sup>98</sup> Nowak & Rotunda, *supra*, n 4 at 574 § 14.3.

<sup>99</sup> *Supra*, nn 34-60 and the accompanying text.

Nevertheless it is submitted that the doctrine's misapplication does not undermine its acceptance in Malaysia. This is reinforced by a subsequent decision, *Government of Malaysia v VR Menon*,<sup>100</sup> in which five judges of the Supreme Court of Malaysia implied that a stricter standard of review is appropriate in cases involving fundamental rights. While they did not expressly mention if strict review is also applicable to suspect-class discrimination, the court felt that the *Malaysian Bar* case "set out the correct approach in determining permissible legislative classification in relation to the equality provision of art 8(1)."<sup>101</sup> On the basis of these cases, it is submitted the doctrine of strict scrutiny applies in Singapore. Since the doctrine of intermediate review is a modification of strict scrutiny in appropriate cases, by the same token it should be considered part of Singapore and Malaysian law.

There are also policy reasons for applying strict and intermediate scrutiny in the local context. For a start, our Constitution ensures that minorities have neither less nor more rights than the majority.<sup>102</sup> If minorities suffer social isolation and prejudice, they may feel deterred or even be prevented from participating in the political process, *eg* by standing for election, and so may be less able to persuade the majority to treat them fairly. The court thus has a constitutional responsibility to carefully scrutinise legislation passed by the majority which impinges on minority interests.<sup>103</sup> Legislation that unfairly restricts these interests is entitled to substantially less deference than other legislation.<sup>104</sup>

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<sup>100</sup> [1990] 1 MLJ 277 at 279 col 21-280 col 1A.

<sup>101</sup> *Ibid* at 279 col 1E.

<sup>102</sup> *Supra*, n 2.

<sup>103</sup> Craig R Ducat & Harold W Chase, *Constitutional Interpretation* (5th ed, 1992) at 93.

<sup>104</sup> *United States v Carolene Products Co*, *supra*, n 28.

Secondly, heightened scrutiny reinforces the notion of fundamental liberties. If some rights are established as fundamental by the Constitution, it stands to reason that everyone is entitled to these rights before claims to non-fundamental rights can be granted. Therefore in any conflict between persons attempting to have their fundamental liberties recognised and others claiming less important rights, fundamental liberties must prevail even if the number of people claiming them is significantly less.<sup>105</sup>

Finally, heightened scrutiny ensures that while the government has the power to make distinctions in the way it treats people, where fundamental rights or protected classes are involved it must not do so for reasons that have no convincing relationship to the issue sought to be dealt with by statute.<sup>106</sup> Intermediate scrutiny is useful where the government should be allowed to discriminate against a class of persons for certain purposes but not for others. In general, heightened scrutiny reminds lawmakers to be cautious of their own purposes and assumptions, and the effects of their choices.<sup>107</sup>

### III. LEGISLATIVE HISTORY AND INTERPRETATION OF SECTIONS 377 AND 377A OF THE PENAL CODE<sup>108</sup>

A statutory provision violates heightened standards of equal protection if the motivation behind its enactment is to intentionally discriminate against a suspect class. This must be proved by direct evidence of the provision's legislative history. As an example of how equal protection doctrine might operate, we now consider the constitutionality of ss 377 and 377A of the Penal Code. These

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<sup>105</sup> *Supra*, n 103 at 95.

<sup>106</sup> *Ibid.*

<sup>107</sup> Tribe, *supra*, n 84 at 1451 § 16-6.

<sup>108</sup> Chapter 224, 1985 Rev Ed.

sections appear in Chapter XVI of the Penal Code and are termed “unnatural offences”. The phrase “anti-sodomy provisions” will be used as a shorthand to refer to the offences collectively. The Oxford English Dictionary<sup>109</sup> explains *sodomy* as “an unnatural form of sexual intercourse, *esp* that of one male with another.” Thus the word technically has a wide meaning, although it is often loosely applied to anal intercourse only.

### A. Section 377

#### 1. Legislative History

For centuries sodomy was a capital offence in England.<sup>110</sup> Originally, only ecclesiastical courts had jurisdiction over the offence as it was based on Biblical proscriptions of the practice.<sup>111</sup> In the past it appears that the offence included both lesbianism and

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<sup>109</sup> 2nd ed, 1989.

<sup>110</sup> See Wayne C Barteet & Alice Fleetwood Barteet, *Litigating Morality: American Legal Thought and its English Roots* (1992) at 31-36.

<sup>111</sup> The Christian Church’s teaching on homosexuality is based on God’s original plan for mankind: God commanded Adam and Eve to “be fruitful and multiply” by means of sexual procreation (Gen 1:28). Thus sexual intercourse without a lifelong commitment (fornication or adultery) or between two men or two women even if in a lifelong commitment is outside God’s will. “If a man lies with a male as with a woman, both of them have committed an abomination; they shall be put to death, their blood is upon them.”: Lev 20:13. In New Testament times, Jesus Christ upheld Old Testament law (Mt 5:17-19) and affirmed that only sexuality in a heterosexual context between a married couple is legitimate; celibacy is the only legitimate alternative to marriage: Mt 19:12. The sinfulness of homosexuality was maintained in early Christian teaching: “Even the women pervert the natural use of their sex by unnatural acts. In the same way the men give up natural sexual relations with women and burn with passion for each other. Men do shameful things with each other, and as a result they bring upon themselves the punishment they deserve for their wrongdoing.”: Rom 1:26-27. See Bob Davies, “What the Bible Says About Homosexuality” (1993) *Discipleship Journal*, issue 73, at 26.

male homosexuality, for in the 13th century a treatise called *Fleta*, compiled by several English judges, identified and described the crime of sodomy simply as intercourse with a person of one's own gender, or with animals. *Britton*, a legal treatise of the 14th century, was an almost verbatim translation. Michael Dalton's *The Countrey Justice* (1618) included in the offence sexual acts involving only women. However, later descriptions of the offence specifically excluded lesbian acts. Sir Edward Coke's influential restatement of English law in his *Institutes* (1648) says that the offence was committed "by mankind with mankind, or with brute beast, or by womankind with brute beast."<sup>112</sup>

This was the interpretation placed on the statute 25 Hen VIII c 6 (1533), which first made sodomy an offence triable by ordinary criminal courts. The offence, described as "the detestable and abominable vice of buggery committed with mankind or beast", was modified and repealed but later revived by 5 Eliz c 17. The offence was finally incorporated into the Offences Against the Person Act 1829 (9 Geo IV c 31),<sup>113</sup> and now exists as s 12 of the Sexual Offences Act 1956 (c 69).<sup>114</sup>

Section 377 of our Penal Code was enacted as part of the Straits Settlements Penal Code by Ordinance No 4 of 1871, which was derived from the Indian Penal Code (Act XLV of 1860). It came into force on 16 September 1872.<sup>115</sup> Whitley Stokes said

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<sup>112</sup> Sir Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown and Criminal Causes* (2nd ed, 1648) at 58, reprinted in the Appendix to this article.

<sup>113</sup> Section XV reads: "And it be enacted, That every Person convicted of the abominable Crime of Buggery, committed either with Mankind or with every Animal, shall suffer Death as a Felon."

<sup>114</sup> Homosexual acts between consenting males above 21 were decriminalised by s 1(1) of the UK Sexual Offences Act 1967 (c 60). The age of consent was recently lowered to 18 by s 145 of the UK Criminal Justice and Public Order Act 1994 (c 33).

<sup>115</sup> See Andrew Phang Boon Leong, "Of Codes and Ideology: Some Notes



the Indian Penal Code was “based on the law of England, stripped of technicality and local peculiarities, shortened, simplified, made intelligible and precise; but suggestions were derived from the French Code Penal and from Livingston’s Code of Louisiana.”<sup>116</sup> Although the main drafter of the Indian Code, Lord Macaulay, denied that he had consciously relied on English criminal law he was certainly influenced by it. Doubtless he considered the Offences Against the Person Act 1826, but instead of following this he used the form of indictment prescribed by English law for sodomy cases: “*contra natura ordinum habuit veneream et Carnaliter cognovit*” (carnal intercourse against the order of nature).<sup>117</sup>

Section 377 was probably included in the Indian Penal Code because sodomy was viewed as immoral. Lord Macaulay was reluctant to articulate the reasons for its inclusion:

[The clauses dealing with rape and unnatural offences] relate to an odious class of offences respecting which it is desirable that as little as possible should be said. . . . We are unwilling to insert, either in the text or in the notes, any thing which could give rise to public discussion on this revolting subject; as we are decidedly of opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision.<sup>118</sup>

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on the Origins of the Major Criminal Enactments of Singapore” (1989) 31 Mal LR 46-63; and KL Koh, CMV Clarkson & NA Morgan, *Criminal Law in Singapore and Malaysia* (1989) at 4-5 for a detailed discussion of the Penal Code’s introduction into Singapore.

<sup>116</sup> *The Anglo-Indian Codes* (Whitley Stokes ed, 1887) at 71, cited in Andrew Phang, *ibid*.

<sup>117</sup> *Government v Bapoji Bhatt* (1884) 7 Mysore LR 280 at 281-82. The words of the indictment are also cited by Coke, *supra*, n 112 at 59.

<sup>118</sup> “Introductory Report Upon the Indian Penal Code: From: TB Macaulay,

This did not deter Kennedy ACJ in *Khanu v Emperor*<sup>119</sup> from freely speculating that unnatural offences were still punishable in modern nations:

Partly I suppose because of the desire of princes to encourage legitimate marriage. Partly because there is an idea, (perhaps erroneous) that the public or tolerated practice of that vice creates a tendency in the citizens of the State, where it is practised, to adopt an unmanly and morbid method of life and thinking, so that a person saturated with those ideas is a less useful member of society, partly because of the danger that men put in authority over other men may use their power for the gratification of their lusts, but principally I suppose because of the danger to young persons, lest they be indoctrinated into sexual matters prematurely.

Apart from the point on child abuse, the other rationalisations are doubtful. It is questionable whether any of them justify the existence of s 377 today.

## 2. Interpretation and Scope<sup>120</sup>

377. Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animals, shall be punished with imprisonment for life, or with imprisonment for a term which may extend to 10 years, and shall also be liable to fine.

*Explanation.* – Penetration is sufficient to constitute the

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JM Macleod, GW Anderson, F Millett: Indian Law Commission to: Lord Auckland, Governor-General of India in Council, Dated 14 October 1837" in *The Works of Lord Macaulay, Speeches – Poems and Miscellaneous* (Albany ed, 1837) vol XI note (M) at 144.

<sup>119</sup> [1925] AIR Sind 286 at 286-87.

<sup>120</sup> See generally, HS Gour, *Penal Law of India* (10th ed, 1987) vol IV at 3259-62; and *Ratanlal & Dhirajlal's Law of Crimes* (23rd ed, 1991) vol II at 1417-21.

carnal intercourse necessary to the offence described in the section.

Indian commentators rely heavily on English authorities to interpret s 377. Whether it is correct to do so is beyond the scope of this article.<sup>121</sup> Since the section has not changed materially since it was enacted in Singapore,<sup>122</sup> Indian cases can be applied to interpret it.

(1) *Actus Reus*: The *actus reus* of the offence is the commission of carnal intercourse against the order of nature, which is not defined in the Penal Code.<sup>123</sup>

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<sup>121</sup> Many commentators have condemned the use of English criminal law to interpret the Penal Code; for instance, V Balasubrahmanyam, “The Guilty Mind” in *Essays on the Indian Penal Code* (1962): “It is a tragedy that some times the Indian Penal Code is called upon to bear the oppressive weight of English case law.” Cf Stanley Yeo Meng Heong, “The Application of Common Law Defences to the Penal Code in Singapore and Malaysia” in *The Common Law in Singapore and Malaysia* (AJ Harding ed, 1985) at 145-46: “Common law principles may assist in the application of this rule of interpretation, provided always that those principles are generally consistent with the statutory provisions concerned.”

<sup>122</sup> Section 377 was amended by s 11 of the Penal Code Amendment Ordinance 1872 (No 3 of 1872) so that for every second or subsequent offence the punishment was whipping. By s 13 of the Amendment Ordinance this change was to be “taken and read as part of the Penal Code, and shall come into operation at the same time as the Penal Code.” The section was again amended by s 16 of Ordinance No 35 of 1933 to read: “. . . punished with penal servitude for life, or with imprisonment of either description for a term which may extend to 10 years, and shall also be liable to fine or to whipping.” Finally, the Criminal Justice (Punishment – Amendment) Ordinance 1954 (No 20 of 1954) abolished penal servitude and deleted the words “or to whipping” from the section.

<sup>123</sup> Contrast the new s 377A of the Malaysian Penal Code, inserted by the Penal Code (Amendment) Act 1989 (Act A727 of 1989), which defines carnal intercourse against the order of nature as “sexual connection with another person by the introduction of the penis into the anus or mouth of the other person”.

(a) *Anal Intercourse* (coitus per anum, *buggery*, “*sodomy*”, “*sin of Sodom*”): From early times, anal intercourse was punishable in England as the offence of buggery, defined as sexual intercourse *per anum* by a man with another man or with a woman.<sup>124</sup> It seems incontrovertible that anal intercourse also constitutes carnal intercourse against the order of nature. The Singapore Court of Criminal Appeal in *M Kanagasuntharam v PP* accepted without discussion that the sexual act falls within s 377.<sup>125</sup>

(b) *Fellatio* (coitus per os, “*sin of Gomorrah*”): There is more controversy where this sexual act is concerned. Two divergent lines of authority exist. In England fellatio is not considered buggery,<sup>126</sup> and this was applied *obiter dicta* to s 377 in Madras by *Re Govindarajulu Naicken*.<sup>127</sup> In *Government v Bapoji Bhatt*<sup>128</sup> Plumer CJ came to the same conclusion, reasoning that since s 377 was clearly drafted along the same lines as the English law of sodomy, the ingredients of the offence were precisely the same.

On the other hand, the court in *Sirkar v Gula Mythien Pillai Ch Ithu Mahomathu*<sup>129</sup> felt it unnecessary to refer to English

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<sup>124</sup> *R v Wiseman* (1718) Fortes Rep 91, 92 ER 774; *R v Reeksphear* (1832) 1 Mood CC 342, 168 ER 1296; *R v Barron* [1914] 2 KB 570 at 576, 10 Cr App Rep 81 at 89 (CCA). (Buggery also encompasses sexual intercourse *per anum* or *per vaginam* by a man or a woman with an animal: *R v Cozins* (1834) 6 C & P 351, 172 ER 1272; *R v Brown* (1889) 24 QBD 357 (CCA); *R v Bourne* (1952) 36 Cr App Rep 125 (CCA).)

<sup>125</sup> [1992] 1 SLR 81. See also *PP v Jumahat*, Criminal Case No 9/1992, 14 August 1992 (HC) (referred to in the case as “sodomy”).

<sup>126</sup> *R v Jacobs* (1817) Russ & Ry 331, 168 ER 830.

<sup>127</sup> (1886) 1 Weir 382.

<sup>128</sup> *Supra*, n 117 at 281-82.

<sup>129</sup> (1908) 14(3) Travancore LR (appendix) 43 at 45.

law, instead holding that “the words used in the Penal Code are very simple and wide enough to include all acts against the order of nature. It would be contrary to reason to hold on the language of the Code that sodomy in its strict sense is punishable, but not an offence which is much more abominable and against the order of nature.” In *Khanu*<sup>130</sup> Kennedy AJC said: “[T]here is no intercourse unless the visiting member is enveloped at least partially by the visited organism, for intercourse connotes reciprocity. Looking at the question in this way it would seem that the sin of Gomorrah is no less carnal intercourse, than the sin of Sodom.” *Khanu* was applied in *Lohana Vasantlal Devchand v The State*<sup>131</sup> where Sheth J commented, “[T]he orifice of the mouth is not, according to nature, meant for sexual or carnal intercourse. Viewing from that aspect, it could be said that this act of putting a male organ into the mouth of the victim for the purposes of satisfying his sexual appetite, would be an act of carnal intercourse against the order of nature.” This reading is supported by the wording of s 377 which is wider than the English offence of buggery. Had Lord Macaulay intended the Indian and English offences to be identical, why did he not follow the wording of the English offence?

The Singapore position is no clearer. It was assumed without discussion in *Kanagasuntharam*<sup>132</sup> that fellatio is punishable under s 377. When the issue was specifically raised before the High Court in the recent decision, *PP v Victor Rajoo s/o A Pitchay Muthu*,<sup>133</sup> the same conclusion was reached. However, less than a month later, the High Court held in *PP*

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<sup>130</sup> *Supra*, n 119.

<sup>131</sup> [1968] AIR Guj 252 at 254.

<sup>132</sup> *Supra*, n 125.

<sup>133</sup> Criminal Case No 39 of 1995, 7 August 1995 (HC).

*v Tan Kuan Meng*<sup>134</sup> that fellatio does not constitute carnal intercourse against the order of nature if it is engaged in between consenting adults as a “prelude to natural sex” and not performed as a substitute for natural or consensual sex.<sup>135</sup>

(c) *Other Sexual Acts*: The scope of s 377 is limited by certain unwritten assumptions which are not warranted on a plain and ordinary reading of the provision. For instance, although the Explanation to s 377 merely states that penetration is *sufficient* to constitute carnal intercourse, Indian authorities take it for granted that penetration is a necessary element of the offence,<sup>136</sup> although seminal discharge need not be proved.<sup>137</sup> This apparently results from the application of the common law to the Indian Penal Code. According to Coke: “[T]here must be *penetratio*, that is, *res in re*, either with mankind, or with beast, but the least penetration maketh it carnall intercourse.”<sup>138</sup> This was later embodied in s 17 of the UK Offences Against the Person Act 1828, from which the s 377 Explanation was probably taken:

‘And Whereas upon Trials for. . . Buggery. . . Offenders frequently escape by reason of the Difficulty of the Proof which has been required of the Completion of those several crimes;’ for Remedy thereof be it enacted, That it shall not

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<sup>134</sup> “Justice Lai Clarifies When Oral Sex is Not an Offence”, *The Straits Times*, 30 August 1995 at 3.

<sup>135</sup> Regrettably, the full decision was unavailable at the time of printing and the point is not entirely clear from the sketchy newspaper report. When defence counsel queried whether oral sex between two consenting adults who did not proceed to have natural sex was an offence, Lai J replied, “What is wrong with that?” but later qualified himself by saying, “Let’s cross the bridge when we come to it.”

<sup>136</sup> Gour, *supra*, n 120 at 3262; Ratanlal & Dhirajlal, *supra*, n 120 at 1418.

<sup>137</sup> Lohana Vasantlal Devchand, *supra*, n 131.

<sup>138</sup> Coke, *supra*, n 112.

be necessary, in any of those Cases, to prove the actual Emission of Seed in order to constitute a carnal knowledge, but that the carnal knowledge shall be deemed complete upon Proof of Penetration only.<sup>139</sup>

Furthermore, the cases imply that penetration must be by the penis and not other parts of the body. The upshot of these assumptions is that sexual acts other than those described above such as cunnilingus and mutual masturbation are not s 377 offences. Although “penetration” was given an uncomfortably broad reading in *State of Kerala v Kundumkara Govindan*,<sup>140</sup> where “insertion” or “thrusting” of the penis between the thighs of a female was considered sufficient to constitute an unnatural offence, the case was rejected by the Singapore High Court in *Victor Rajoo*.<sup>141</sup>

The implied limitations on the scope of s 377 also mean that lesbian behaviour is excluded from the section.<sup>142</sup> In *Khanu*,

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<sup>139</sup> This provision was applied by *R v Reekspear* (1832) 1 Mood CC 342, 168 ER 1296. See also Coke, *ibid* at 59: “*Emissio seminis* maketh it not Buggery, but is an evidence in the case of buggery of penetration: and so in Rape the words be also *carnaliter cognovit* [carnal knowledge], and therefore there must be penetration; and *emissio seminis* without penetration maketh no rape.”

<sup>140</sup> (1969) Crim LJ 818.

<sup>141</sup> *Supra*, n 133.

<sup>142</sup> See KL Koh, *Criminal Law* (1977) at 72: “[L]esbianism is not an offence.” It is said that the drafters of the Penal Code in consultation with Queen Victoria excluded the possibility of covering lesbian sexual acts since Queen Victoria could not possibly envisage that such acts could actually take place: Wilfred Ong, “Decriminalising Homosexuality” (1993) 11 *Commentary* 114 at 114. Contrast the position under the Malaysian Penal Code (Amendment) Act 1989 (Act A727 of 1989), which renumbered s 377A as s 377D and deleted all references to males. The effect is that a woman found engaging in lesbian acts with another woman in private may be charged with committing an act of gross indecency.

it was held that “the sin of Lesbos or Reboim is clearly not intercourse”.<sup>143</sup>

One important issue that has not been judicially considered is whether a sexual act can be legal between a man and a woman but constitute an unnatural offence if engaged in by two men. Indian cases suggest that the gender of the participants is immaterial.<sup>144</sup> Although these cases involved one male sexually assaulting another, the judges focused solely on whether the sexual act itself constituted carnal intercourse. In particular, the court in *Bapoji Bhatt* was of the view that fellatio performed by one male on another did not constitute a s 377 offence. However, the local decision *PP v Tan Kuan Meng*<sup>145</sup> seems to imply that the reverse is true. Lai J’s emphasis on “natural sex” as a condition for the legality of fellatio suggests that if it were done by one man to another it would contravene s 377.

It is submitted that whether a particular sexual act contravenes s 377 probably depends ultimately on whether in the circumstances, having regard to prevailing customs and morals, the act is considered carnal intercourse against the order of nature by any right-thinking member of the public. This was the test applied to s 377A by *Ng Huat v PP*,<sup>146</sup> and there seems no reason why it should not apply to both the offences.

(2) *Mens Rea*: The offence in s 377 must be committed “voluntarily” by the accused. This is defined in s 39 of the Penal Code.

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<sup>143</sup> *Supra*, n 119.

<sup>144</sup> See eg *Bapoji Bhatt*, *supra*, n 117; *Sirkar*, *supra*, n 129; *Lohana Vasantlal Devchand*, *supra*, n 131. In *Khanu*, *ibid*, the victim’s sex is unclear from the report, but like the others the case turned on whether fellatio constituted carnal intercourse against the order of nature.

<sup>145</sup> *Supra*, n 134.

<sup>146</sup> [1995] 2 SLR 783 at 792G (HC), discussed in detail *infra*.



A person does something voluntarily when he causes an effect by means by which he intends to cause it, or he knows or has reason to believe to be likely to cause it. The consent or otherwise of the person submitting to the carnal intercourse is immaterial.<sup>147</sup>

## B. Section 377A

### 1. Legislative History

Section 377A is absent from the Indian Penal Code. It was introduced into our Penal Code by s 7 of the Penal Code (Amendment) Ordinance 1938 (No 12 of 1938), and came into effect on 8 July 1938.

The reason for the addition, as stated in the Proceedings of the Legislative Council of the Straits Settlements in 1938<sup>148</sup> was to “[make] punishable acts of gross indecency between male persons which do not amount to an unnatural offence within the meaning of s 377 of the Code.” It was based on s 11 of the UK Criminal Law Amendment Act 1885 (48 & 49 Vict c 69), now s 13 of the UK Sexual Offences Act 1956.

The English section was introduced in the late stages of “a Bill to make further provision for the protection of women and girls, the suppression of brothels, and other purposes.” It was introduced by Henry Labouchere in the House of Commons at the report stage of the Bill, which had previously been passed by the House of Lords where it was introduced without reference to indecency between males. The purpose for the provision was explained thus:

That at present any person on whom an assault of the kind dealt with was committed must be under the age of 13, and

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<sup>147</sup> *R v Jellyman* (1836) 8 C & P 604, 173 ER 637 (interpreting the English law of buggery); *PP v Victor Rajoo s/o A Pitchay Muthu*, *supra*, n 133.

<sup>148</sup> Page C81 dated 25 Apr 1938. See microfiche no 672, STRAITS SETTLEMENTS, Legislative Council, Proceedings (SE 102) vol 1938 (Central Library Reprographic Dept, National University of Singapore).

the object with which he [Labouchère] had brought forward this clause was to make the law applicable to any person whether under the age of 13 or over the age.<sup>149</sup>

The only question raised was whether it was in order to move an amendment which dealt with a class of offence totally different from those contemplated by the Bill. The Speaker ruled that anything could be introduced by leave of the House. The amendment was adopted. In considering this provision, the UK Committee on Homosexual Offences and Prostitution (the Wolfenden Committee) noted that Parliament had passed it without the detailed consideration which such an amendment would almost certainly receive today, even though the provision as adopted was much wider than Labouchère's apparent intention.<sup>150</sup>

In Singapore, during the second reading of the Penal Code (Amendment) Bill,<sup>151</sup> the Attorney-General justified the introduction of s 377A as follows:

[I]t is unfortunately the case that acts of the nature described have been brought to notice. As the law now stands, such acts can only be dealt with, if at all, under the minor offences Ordinance, and then only if committed in public.<sup>152</sup> Punishment

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<sup>149</sup> *Daily Debates*, 6 Aug 1885 col 1397, cited in the Wolfenden Report, *supra*, n 43 at 39 para 108. *Quaere* whether, as suggested in *R v J* (1957) 21 WWR 248 at 250 (SC, App Div, Alberta), the provision was partly a response to the decision of *R v Jacobs* (1817) Russ & Ry 331, 168 ER 830, which held that fellatio is not punishable as buggery.

<sup>150</sup> Wolfenden Report, *ibid*.

<sup>151</sup> Page B49 dated 13 Jun 1938. See microfiche no 667, STRAITS SETTLEMENTS, Legislative Council, Proceedings (SE 102) vol 1938. The first reading of the Bill is at p B25 (microfiche no 666). After the second reading the Bill was sent into committee, read for the third time, and passed on the same day (p B50, microfiche no 667).

<sup>152</sup> The Attorney-General was presumably referring to s 12(d) of the Minor Offences Ordinance (Cap 24, 1936 Rev Ed), which imposed a fine of up to \$25 for the wilful or indecent exposure of one's person.

under the Ordinance is inadequate and the chances of detection are small. It is desired, therefore, to strengthen the law and to bring it into line with English Criminal law, from which this clause is taken, and the law of various other parts of the Colonial Empire of which it is only necessary to mention Hong Kong and Gibraltar [*sic*] where conditions are somewhat similar to our own.

The Legislative Council's intention in enacting s 377A was thus to criminalise behaviour between men considered as "gross indecency" but not falling within s 377, even though such behaviour might be consensual and in private. In doing so it implicitly acknowledged that s 11 of the UK Criminal Law Amendment Act 1885 had an impact much wider than the original reason for its introduction into the House of Commons.

## 2. *Interpretation and Scope*

377A. Any male person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years.

(1) *Actus Reus*: The *actus reus* of s 377A relevant to this article is the commission of an act of gross indecency in private. Gross indecency is not defined in the Penal Code, but is a term well-known to English criminal law. A *Concise Dictionary of Law*<sup>153</sup> defines it as a sexual act that is more than ordinary indecency but falls short of actual intercourse. In *Ng Huat v PP*,<sup>154</sup> the High Court held that:

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<sup>153</sup> 2nd ed, 1990.

<sup>154</sup> [1995] 2 SLR 783 at 792G (HC), citing *R v K & H* (1957) 21 WWR 86 at 88 (SC, Alberta, Canada). In *Ng Huat v PP* [1995] 2 CLAS News

What amounts to a grossly indecent act must depend on whether in the circumstances, and the customs and morals of our times, it would be considered grossly indecent by any right-thinking member of the public. . . . The court does not sit to impose its own moral standards or precepts, but to enforce the morals of the general public.

Gross indecency includes masturbation<sup>155</sup> and indecent physical contact,<sup>156</sup> or even indecent behaviour without any physical contact.<sup>157</sup> The Wolfenden Report<sup>158</sup> was of the view that gross indecency covered any act involving sexual indecency between two male persons:

From the police reports we have seen and the other evidence we have received it appears that the offence usually takes one of three forms; either there is mutual masturbation; or there is some form of intercrural contact; or oral-genital contact (with or without emission) takes place. Occasionally the offence make take a more recondite form; techniques in heterosexual relations vary considerably, and the same is true of homosexual relations.

(2) *Mens rea*: Section 377A is silent as to the *mens rea* required

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8 (HC), permission was refused for questions of law arising out of the case to be referred to the Court of Appeal. Yong Pung How CJ held that although the phrase “gross indecency” had hitherto not been judicially interpreted in Singapore, this did not in itself mean it was a question of law of public interest within the meaning of s 60 of the Supreme Court of Judicature Act (Cap 322, 1985 Rev Ed).

The only other reported case on s 377A is *R v Captain Douglas Marr* [1946] MLJ 77 (SC, Straits Settlements), but there was no discussion in this decision on the elements of the offence.

<sup>155</sup> *Eg R v Preece* [1977] QB 370 (CA).

<sup>156</sup> *Eg R v Burrows* [1952] 1 All ER 58n (CCA); *Ng Huat v PP*, *supra*, n 154.

<sup>157</sup> *R v Hunt* [1950] 2 All ER 291.

<sup>158</sup> *Supra*, n 43 at 38 para 104.

for the offence. Thus it may either be considered a strict liability offence, or the presumption of *mens rea* approach may be followed.<sup>159</sup>

### C. *Impact of Sections 377 and 377A*

We have seen that if the participants' gender is a relevant factor in determining whether sexual acts fall within s 377, most forms of penetrative sexual behaviour between two men might well be considered unnatural offences. However, if gender is irrelevant, certain types of sexual intercourse such as fellatio might not contravene s 377 even between homosexuals. It also seems that the provision does not cover non-penetrative sexual acts such as mutual masturbation. However, sexual behaviour not covered by s 377 would probably fall within "gross indecency" under s 377A. Therefore, where homosexuals are concerned, all forms of sexual behaviour are probably unlawful.

## IV. WHY SECTIONS 377 AND 377A ARE DISCRIMINATORY

### A. *Inequality on the Face of the Statute*

#### 1. *Section 377*

Since s 377 applies to all persons, it appears on its face not to violate Art 12(1).<sup>160</sup> However, it is submitted that s 377 is

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<sup>159</sup> See CMV Clarkson, "Rape: Emasculation of the Penal Code" [1988] 1 MLJ cxiii at cxvii-cxx for a lucid discussion. See also Koh, Clarkson & Morgan, *supra*, n 115 at 76-98.

<sup>160</sup> But note that a facially-neutral statute purporting to criminalise a certain form of behaviour among all persons is still invalid if its impetus and effect is really to discourage such behaviour among a limited class only: Note, "Sexual Orientation and the Law" (1989) 102 Harv L Rev 1509 at 1531.

not facially-neutral because it may forbid certain sexual acts by homosexuals but not by heterosexuals, and does not forbid lesbian sexual acts at all.<sup>161</sup> Moreover the section disproportionately impacts homosexuals since it criminalises their primary means of sexual activity. Under heightened review, discrimination is established if the provision causes disproportionate impact on the suspect or quasi-suspect class and there is proof of discriminatory intent on the legislature's part. In *Nordin bin Salleh v Dewan Undangan Negeri Kelantan*,<sup>162</sup> it was held that to determine if a statute infringes a particular fundamental right, the court must ask itself:

what is the direct and inevitable consequence or effect of the impugned statute on the fundamental right of the plaintiffs, and if the effect of the statute on the fundamental rights is direct or inevitable, then *a fortiori* the effect must be presumed to have been intended by the statute. Where, therefore, the statute directly affects the fundamental right, or its inevitable effect on the fundamental right is such that it makes the exercise of the right ineffective or illusory, the statute must be held to be unconstitutional, and must be struck down.

It is submitted that the provision may even be unconstitutional under rational review since its entire premise is inherently bad.

(1) *Enforcement of Religious and Moral Values*: Sodomy was originally made an offence because of Biblical prohibitions of the practice. This is no longer fitting as a justification of the offence in society today. It is inappropriate for the criminal law to impose perceptions of a particular religious group onto non-believers. In *People v Onofre*<sup>163</sup> it was held *inter alia* that "it is

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<sup>161</sup> *Supra*, nn 142-46 and the accompanying text.

<sup>162</sup> [1992] 1 MLJ 343 at 357 (HC, Kuala Lumpur), applying *Maneka Gandhi v Union of India* [1978] AIR SC 597.

<sup>163</sup> (1980) 415 NE 2d 936 at 940 n 3 (majority opinion).

not the function of the Penal Law... to provide either a medium for the articulation or the apparatus for the intended enforcement of the enforcement of moral or theological values..."

Apart from religious grounds, anti-sodomy laws have been justified on the ground that permitting private consensual sodomy would promote immorality, resulting in rejection of moral values such as fidelity in marriage and family responsibilities. It is true that homosexual behaviour on the part of husbands has broken up marriages, and homosexuals may not enter into marriages which might otherwise have been successfully consummated.<sup>164</sup> But it is unlikely that anti-sodomy laws have made much difference. It is hard to see how such laws strengthen traditional marriages. In fact, such reasoning suggests that the homosexual preference is strong and the heterosexual preference weak, and that conventional family life is so unattractive that people would abandon it if sodomy were legitimised. This is patently untrue. Homosexuals make up only a minority of the population,<sup>165</sup> and marriage is a well-established institution.

Furthermore, extra-marital sex and lesbianism inflict just as much damage on family life as homosexuality.<sup>166</sup> In the Bible heterosexual immorality is as sinful as homosexuality.<sup>167</sup> It is

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<sup>164</sup> Wolfenden Report, *supra*, n 43 at 22 para 55.

<sup>165</sup> Estimates of the percentage of homosexuals in the United States population range from 10% (Kinsey, 1948) to 1% (Guttmacher, 1993), though figures are disputed. See "The Impact on Gay Political Power", *Newsweek*, 26 April 1993 at 45; Ward & Swarts, above, n 54 at 374-75, 378-79. The most comprehensive study (Laumann, Michael & Michaels, 1994) conducted in the United States since Kinsey's survey revealed that 2.7% of men and 1.3% of women reported having homosexual sex in 1993. 7.1% of men and 3.8% of women reported having homosexual sex since puberty, while 6.2% of men and 4.4% of women reported being sexually attracted to people of the same gender: "Now For the Truth About Americans and Sex" *Time*, 17 October 1994 at 40, 43. No local studies have been published.

<sup>166</sup> Wolfenden Report, *supra*, n 43 at 22 para 55.

<sup>167</sup> Lev 20:10: "If a man commits adultery with the wife of his neighbour,

incongruous that the legislature has seen fit to leave society to deal with these problems, but criminalized only homosexual behaviour between males. The Wolfenden Report concluded that private morality should not influence criminal law unless it endangers public order, the safety of citizens, or causes persons to risk exploitation or corruption by others, and therefore private consensual sexual activity should not be regulated by the government.<sup>168</sup> In its view:

Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business. To say this is not to condone or encourage private immorality. On the contrary, to emphasise the personal and private nature of moral or immoral conduct is to emphasise the personal and private responsibility of the individual for his own actions, and that is a responsibility which a mature agent can properly be expected to carry for himself without the threat of punishment from the law.<sup>169</sup>

(2) *Reducing the Spread of HIV/AIDS*: In the early 1980s American men who had experienced homosexual contact constituted 70% of reported cases of Acquired Immune Deficiency Syndrome (AIDS).<sup>170</sup> Due to the high incidence of Human Immunodeficiency Virus (HIV) infection and AIDS among male homosexuals,

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both the adulterer and adulteress shall be put to death.” Heb 13:4: “Let marriage be held in honour among all, and let the marriage bed be undefiled; for God will judge the immoral and adulterous.”

<sup>168</sup> Wolfenden Report, *supra*, n 43 at 23-24, 48.

<sup>169</sup> *Ibid* at 24 para 61.

<sup>170</sup> Selik, Haverkos & Curran, “Acquired Immune Deficiency Syndrome (AIDS): Trends in the US, 1978-1982” (1984) 76 *Amer J of Med* 394 at 499.



it was postulated that anti-sodomy laws help to prevent the spread of the fatal disease.

But recent estimates indicate that heterosexual infection in the United States is increasing while infection in other groups is stable or decreasing from peak rates occurring in the early and mid-1980s.<sup>171</sup> This is borne out by data from other countries, including Singapore where studies show that from the mid-1990s HIV transmission has changed from one that was predominantly homosexual or bisexual to one that it is increasingly heterosexual.<sup>172</sup> It is no longer accurate to characterise HIV/AIDS as a “gay disease”.

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<sup>171</sup> RJ Bigger & PS Rosenberg, “HIV Infection/AIDS in the United States During the 1990s” (1993) 17 (Supp 1) Clin Infect Dis S219. The Centres for Disease Control and Prevention (CDC) in Atlanta, Georgia, also reported that in 1993 gay men accounted for less than half of the new AIDS cases in the US. Heterosexual cases rose more sharply than any other category, constituting 9% of cases recorded in 1993 (an increase from 2% in 1985). The report concluded that anyone having unprotected sex with multiple partners is at risk: see “Danger Signs”, *Newsweek*, 21 March 1994 at 45.

<sup>172</sup> SK Chew, “Trends in Human Immunodeficiency Virus Infection: Epidemiology in Singapore” (1993) 22(2) Ann Acad Med S’pore 142. The infection rate among heterosexuals increased from 27% of all cases in 1985-90 to 72% in 1993, while among homosexuals it fell from 53% to 11%. The rate among bisexuals remained stable (20% compared to 17%); “Anti-Aids Campaign to Target Casual Sex”, *The Straits Times*, 25 November 1993 at 1. Since 1993, the heterosexual infection rate has remained at over 70%. Of the 20 new cases reported between April and June 1995, 17 were heterosexual, 2 were bisexual and 1 was homosexual. Since 1985, when the first case was detected, 348 Singaporeans have contracted HIV. Of these, 47 have full-blown AIDS, 197 are HIV-positive without symptoms of AIDS yet, and 104 have died: “HIV Caught Mainly From Partners of Opposite Sex”, *The Straits Times*, 2 August 1995 at 21.

The Malaysian position is similar. As of January 1995, 11,175 infection cases have been reported. Of these, 200 have developed full-blown AIDS and 150 have died. Heterosexual infection rates have increased steadily, reaching about 10% in 1994: “More Cases of Aids Spread Through Heterosexual Sex”, *The Sunday Times*, 12 March 1995 at 20.

In any case, anti-sodomy provisions are not drafted to deal with HIV/AIDS. They are over-inclusive since they cover homosexuals who are not HIV-infected, and under-inclusive as they exclude heterosexuals who are. If homosexuals constitute a quasi-suspect or suspect class, then such over- and under-inclusiveness cannot be tolerated. For the criminal law is to be useful at all to contain the AIDS epidemic, provisions should be closely tailored to include only HIV-positive individuals. Risk of sexual transmission depends on sexual acts and not the gender or sexual orientation of the participants. However the use of criminal sanctions against AIDS is probably ineffective, for risks of punishment are usually the last things on the minds of people in moments of pleasure. Punitive policies may discourage HIV-infected persons from seeking counselling and treatment. Regular public education is more likely to modify high-risk sexual activity.<sup>173</sup> Disclosure requirements, precautions, and tort suits have also been suggested as better alternatives.<sup>174</sup>

## 2. Section 377A

The English equivalent of s 377A was introduced in the House of Commons to prevent indecent assault. However, the breadth

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<sup>173</sup> TKK Iyer, "Containment of AIDS in Singapore – Legal and Policy Implications" (1993) 22(1) Ann Acad Med S'pore 111 at 112. For a general discussion on the legislative control of AIDS in Singapore, see Elaine Lee, Lee Woon Shiu & Margaret Law Yuh Tyng, "AIDS and the Law" (1994) 15 Sing LR 213. Note, though, the inaccuracy on p 238 n 51: the defendants in *CLB v PP* [1993] 1 SLR 598 (HC) were convicted under s 182 of the Penal Code (Cap 224, 1985 Rev Ed) for giving false evidence to the Medical Director of the Singapore Blood Transfusion Service by filling in their blood donor registration forms wrongly. They were not charged under s 20C of the Infectious Diseases Act (Cap 137, 1985 Rev Ed) introduced by the Infectious Diseases (Amendment) Act 1992 (No 5 of 1992) as they did not know they were HIV-positive at the time of the offence.

<sup>174</sup> *Supra*, n 160 at 1530.

of the provisions actually enacted in England and Singapore point strongly to an intention to deliberately criminalise private consensual male homosexual acts not amounting to carnal intercourse under s 377. Section 377A is thus discriminatory because such sexual behaviour in heterosexuals and lesbians is not similarly prohibited.

### B. Selective Enforcement<sup>175</sup>

Section 377 is also discriminatory if it can be proved that it is selectively enforced against homosexuals.<sup>176</sup> Up to 1995, only five cases involving s 377 could be located (four of them involving heterosexual offences committed in the course of a rape),<sup>177</sup> making it impossible to tell if selective enforcement is a trend in Singapore.<sup>178</sup> The paucity of cases may in fact suggest we have

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<sup>175</sup> *Ibid* at 1533.

<sup>176</sup> See *Yick Wo v Hopkins* (1886) 118 US 356 at 373-74 (discriminatory intent of board administering laundry-licensing law inferred from pattern of refusing licences to all Chinese applicants and granting licences to nearly all Caucasian applicants).

<sup>177</sup> *Kanagasuntharam*, *supra*, n 125; *Jumahat*, *supra*, n 125; *Victor Rajoo*, *supra*, n 133; *Tan Kuan Meng*, *supra*, n 134. The facts of the last case, *Ahmad bin Hassan v PP* [1958J MLJ 186 (CCA, Kuala Lumpur), were not disclosed in the report.

<sup>178</sup> However newspaper reports show that law enforcement officers often carry out undercover entrapment of homosexuals. For example, in March 1992, several men were arrested at a beach in East Coast Park which had been used as a homosexual meeting place. They were charged with outraging the modesty of undercover police under s 354 of the Penal Code: see *The Straits Times* and *The New Paper*, 10-11 March 1992. It may have been the notoriety of this crackdown that helped it make the papers; in any case it is rare to see news of heterosexual couples being arrested for similar offences. In *Tan Boon Hock v PP* [1994] 2 SLR 150 at 152F-H, Yong Pung How CJ found it “disquieting” that accused persons arrested as a result of ‘anti-gay’ operations aimed at ‘flushing-out’ homosexuals should subsequently be charged with having outraged the modesty of the

to thank the Attorney-General for exercising his discretion not to prosecute instances of private homosexual behaviour. However the mere non-enforcement of a law is not a good reason for keeping it in the statute books if it is established that the law is unconstitutional.

In any case, selective enforcement is virtually impossible to establish in court since such cases are highly fact-dependent and must include proof of intentional or purposeful discriminatory enforcement to succeed.

#### V. CONCLUSION

In January and February 1992, a Censorship Review Committee was set up to conduct a survey to determine if there was a change in the moral values of Singaporeans over the last ten years. Although the perception was that moral values had become more liberal, the study found that a majority of respondents were actually more conservative than their counterparts a decade ago. A majority disapproved of moral issues such as pre-marital sex, cohabitation, extra-marital sex, and homosexuality and lesbianism because of religious beliefs and moral principles.<sup>179</sup>

In particular, 86% of respondents disapproved of homosexuality and lesbianism as a way of life. Of these respondents, 44% disapproved on moral and religious grounds, 25% because they viewed such behaviour as “not acceptable in society”, and 14% because of the fear of AIDS and other sexually-transmitted diseases.<sup>180</sup>

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police officers they came into contact with, since it was at least arguable that consent from the police officers had been forthcoming.

<sup>179</sup> Censorship Review Committee, *Survey on Changing Moral Values and Public Perception of Certain Printed, Audio and Visual Materials: Report* (1992) at 3-4.

<sup>180</sup> *Ibid* at 31-36.

The report comes at a time of greater consciousness about homosexuals in society.<sup>181</sup> There has been a proliferation of books, plays, art exhibitions and films with homosexual themes. Controversy has raged in the United States over the causes of homosexuality and whether the Clinton administration should have ended the military's ban on homosexuals serving in the uniformed services.<sup>182</sup>

Divided as people are over the acceptability of alternative lifestyles, it is one thing to disapprove of somebody's behaviour on moral grounds but quite another to subject him or her to criminal sanctions. It is submitted that the legislature, in enacting ss 377 and 377A of the Penal Code, has discriminated against male homosexuals as compared to lesbians and heterosexuals, infringing the right of equal protection in our Constitution. Although ss 377 and 377A may pass the rational nexus test, they are unconstitutional since the object of the sections is inherently bad. In addition, ss 377 and 377A are discriminatory under intermediate or even strict scrutiny since homosexuals form a quasi-suspect or suspect class. The scheme of Art 12, judicial and academic pronouncements, and public policy all support the application of strict scrutiny as a part of equal protection doctrine in Malaysia and Singapore. Intermediate review is applicable by analogy. Hence it is submitted that ss 377 and 377A should be read<sup>183</sup> to prohibit

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<sup>181</sup> For a rare local view, see LP Kok, YG Ang, YH Fong & SHC Siew, "Profile of a Homosexual in Singapore" (1991) 32 Sing Med J 403.

<sup>182</sup> *Newsweek*, 23 November 1992 at 32; 1 February 1993 at 38; *The Straits Times*, 26 January 1993 at 8, 27 January 1993 at 8, 29 January 1993 at 10, 30 January 1993 at 4, 31 January 1993 at 6.

<sup>183</sup> Article 4 (the supremacy clause) does not apply because the Penal Code was enacted before the commencement of the Constitution. However, the court is empowered by Art 162 to construe all laws existing at the time of the commencement of the Constitution with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.

only male rape, homosexual acts with minors (whether consensual or not) and sexual activity in public places which would offend sensibilities. More preferably, the sections should be done away with and replaced with more suitable provisions.<sup>184</sup>

The criminal law, with its strong emphasis on retribution, deterrence and incapacitation, is a completely inappropriate way to deal with the issue. Punishment is severe: a man who engages in consensual intercourse with another in the privacy of his home can be sentenced to life imprisonment or up to ten years' imprisonment if convicted under s 377, or up to two years' imprisonment under s 377A. The same penalties are respectively imposed for culpable homicide and causing death by a rash or negligent act.<sup>185</sup> Surely such punishment is too harsh for acts which are at worst only morally outrageous.

It was recently commented that, "Historically, [American] society has failed to address the plight of homosexuals in a responsible, compassionate manner. Too often in the past, people with homosexual tendencies were marginalised, branded as *faggots* and *dykes*. The emergence of a militant gay rights movement is, in many respects, the consequence of the cold, insensitive manner in which gays were treated in the past."<sup>186</sup> Such a situation has not yet occurred in Singapore, but we would do well not to repeat the mistakes of others.

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<sup>184</sup> See, *eg*, the new s 1(1) of the UK Sexual Offences Act 1956 (c 69), inserted by s 142 of the UK Criminal Justice and Public Order Act 1994 (c 33), which makes it an offence for a man to rape a woman or another man. Rape has been redefined as sexual intercourse (whether vaginal or anal) with another person if that person does not consent, the perpetrator knowing that the victim does not consent or reckless as to whether he or she consents.

<sup>185</sup> Penal Code, ss 304 and 304A respectively.

<sup>186</sup> Ward & Swarts, *supra*, n 54 at 381.

This article must not be read as condoning, accepting or affirming the homosexual lifestyle.<sup>187</sup> The toleration and respect that I show for you as a person does not mandate that I accept your viewpoints as truth. However those of us who make up the heterosexual majority have a responsibility to respect homosexuals as persons and protect them from discrimination and abuse, regardless of how distasteful we find their behaviour. This is the essence of equal protection: understanding should be shown to all marginalised groups in society, regardless of their nature. Change must be effected through the pricking of personal consciences by social, moral and religious teachings, not the infamous blunt instrument of the criminal law.<sup>188</sup>

#### APPENDIX

Sir Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown and Criminall Causes* (2nd ed, 1648) at 58-59

#### CAP X Of Buggery, or Sodomy

If any person shall commit buggery with mankind, 25 H 8 ca 6  
or beast; by authority of Parliament this offence is 5 Eliz ca 17  
adjudged felony without benefit of Clergy. But it 1 Mar ubi sup  
is to be known, (that I may observe it once and for

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<sup>187</sup> Ward & Swarts, *ibid* at 380-81; Morton A Kaplan, "Common Sense on Gay Rights" (1993) 8(10) *The World & I* 397 at 401.

<sup>188</sup> *People v Onofre*, *supra*, n 163: "[T]he community and its members are entirely free to employ theological teaching, moral suasion, parental advice, psychological and psychiatric counselling and other non-coercive means to condemn the practice of consensual sodomy."

all) that the statute of 25 H 8 was repealed by the statute of 1 Mar, whereby all offences made felony or *Premunire* by an Act of Parliament made since 1 H 8 were generally repealed, but 25 H 8. is revived by 5 Eliz.

Buggery is a detestable, and abominable sin, amongst Christians not to be named, committed by carnall knowledge against the ordinance of the Creator, and other of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast. Horrendum illud peccatum. 5 El ca 17

*Bugeria* is an Italian word, and signifies to much, as is before described, *Pæderastes* or *Paiderestes* is a Greek word, *Amator purerorum*, which is but a Species of Buggery, and it was complained of in Parliament, that the Lumbaros had brought into the Realm the shamefull sin of Sodomy, that is not to be named, as there it is said. Our ancient Authors doe conclude, that it deserveth death, *ultimum supplicium*, though they differ in the manner of the punishment. Britton saith, that Sodomites and Miscreants shall be burnt: and so were the Sodomites by Almighty God. *Fleta* saith, *Pecorantes & Sodomitæ in terra vivi confodiantur*. and therewith agreeth the *Mirror*, *pur le grand abomination*, and in another place, be saith, *Sodomie est crime de Majeste, vers le Roy celestre*. But (to say it once and for all) the judgement in all cases of felony is, that the person attainted be hanged by the neck, untill he, or she be dead. But in ancient times in that case, the man was hanged, & the woman was drowned, whereof we have seen examples in the reign of R 1. And this is the meaning of ancient Franchsses granted *de Furca & Fossa*, of the Gallows, and the Pit, for the Rot Parl 50 E 3 nu 58

Britton ca 9  
Gen 19.9  
Rom c 1.17  
FNB 269a  
Fleta li 1 ca 35  
Mirror ca 4 §  
de Majesty 1  
§ 15 & cap 2  
Sect 11.



hanging upon the one, and the drowning in the other; but *Fossa* is taken away, and *Furca* remains.

*Cum mesculo non commiscearis coitu foemineo, quio abominatio est. Cum omnipecore non coibis, nee maculaberis cum eo: Mulier non succumbet jumento, nec miscebitur ei, quia seculus est, &c.* Levit 18.22,23.  
1 Tim 1.10

The Act of 25 H 8 hath adjudged it felony, and therefore the judgement for felony doth now belong to this offence, viz to be hanged by the neck till he be dead. He that readeth the Preamble of this Act, shall finde how necessary the reading of our ancient Authors is: The statute doth take away the benefit of Clergy from the Delinquent. But now let us peruse the words of the said description of Buggery.

• **Detestable and abominable.]** These just attributes are found in the Act of 25 H 8.

• **Amongst Christians not to be named.]** These words are in the usuall Indictment of this offence, and are in effect in the Parliament Roll of 50 E 3 Ubi supra nu 58.

\* This is grounded upon the Word of God. viz Gen 19.4,5.

• **By carnall knowledg, &c.]** The words of the Indictment be, *Contra ordinationem Creatoris, & naturae ordinem, rem habuit veneream, dictumque puerum carnaliter\* cognovit, &c.* So as there must be *penetratio*, that is, *res in re*, either with mankind, or with beast, but the least penetration maketh it carnall knowledge.<sup>a</sup> See the indictment of *Stafford*, which was drawn by great advise, for committing

Judges 19.22.  
Ut cognoscamus cos.

<sup>a</sup> Coke lib Intr 352 Mich 5.  
Ja Coram rege.

buggery with a boy; for which he was attainted, and hanged.

<sup>b</sup>The Sodomites came to this abomination by four means, viz by pride, excesse of diet, idlenesse, and contempt of the poor. *Otiosus nihil cogitat, nisi de operatus est nefas, & morte moriatur*. And this accordeth with the ancient Rule of law, *Agentes & consentientes pari pœna plectentur*.

*Emissio seminis* maketh it not Buggery, but is an evidence in case of buggery of penetration: and so in Rape the words be also *carnaliter cognovit*, and therefore there must be penetration; and *emissio seminis* without penetration maketh no Rape.<sup>c</sup> *Vide* in the Chapter of Rape. If the party buggered be within the age of discretion, it is no felony in him, but in the agent only. When any offence is felony either by the Common law, or by statute, all Accessories both before and after, are incidently included.<sup>d</sup> So if any be present, abetting and aiding any to do the act, though the offence be personall, and to be done by one only, as to commit rape, not only he that doth the act is a principall, <sup>e</sup>but also they that be present, abetting, and aiding the misdoer, are principalls also, which is a proof of the other case of Sodomy.

• **Or by woman.]** This is within the Purvien of this Act of 25 H 8. For the words be, *if any person, &c*, which extend as well to a woman, as to a man, and therefore if she commit buggery with a beast; she is a person that commits buggery with a beast, to which end this word [person] was used. And the rather, for that somewhat before the making of this

<sup>b</sup> Ezek 16.49.

Gen 18.29.

Deut 29.23

Esay 13.19.

Jer 23.14.

49.18. 50.4

Luke 17.28,29.

2 Pet 2.6

Jud vers 7.

Rom 1.26,27.

Sapient 10.6,7

<sup>c</sup> Levit 20.13.

1 Cor c 6 v 10.

<sup>d</sup> 3 & 4 P &

Mar Justice

Dalisons

Reports.

Stanf Pl Cor.

Pl com 97.

<sup>e</sup> 11 H 4 13.

See the 2 parts  
of the

Institutes in

the exposition

upon the

statute of W 1

ca 13 and W 2

ca 34.

Act, a great Lady had committed buggery with a Baboon, and conceived by it, &c.

There be four sins in holy Scripture called *Clamantia peccata*, crying sins; inherent this detestable sin is one, expressed in this *Distichon*.

*Sunt vox clamorum, vox sanguinis, & Sodomorum;  
Vox oppressorum, mmerces detenta laborum.*

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#### Notes

Coke was among the first to wrongly attribute buggery to the Italians who presumably adopted the practice from the “Lumbards”. This probably led to his incorrect derivation of the word *buggery* from the Italian *bugeria*. The correct etymology is from the Latin *Bulgarus* meaning “Bulgarian”. There was a widespread belief that heretics from Bulgaria encouraged such practices.

At common law, the “age of discretion” was 14. Buggery could not be committed by a boy under 14: *R v Tatam* (1921) 15 Cr App Rep 132; a person not under 14 could be convicted of the offence although the agent was under 14: *R v Allen* (1849) 1 Den 364, 169 ER 282. Section 1 of the UK Sexual Offences Act 1993 (c 30) has abolished the presumption of criminal law that a boy under 14 is incapable of sexual intercourse, whether natural or unnatural. In Singapore, nothing is an offence which is done by a child under 7 years of age: Penal Code, s 82. A child above seven but under 12 only has a good defence if he has not attained sufficient maturity of understanding to judge the nature and consequence of his conduct: Penal Code, s 83.